VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

RE: John A. Russell Corporation
Land Use Permit Application #1R0849-EB
Docket #749

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

TABLE OF CONTENTS

i. SUMMARY OF DECISION

This proceeding concerns Land Use Permit Application #1R0849 ("Application") pertaining to John A. Russell Corporation's ("Applicant") proposal to construct and operate an asphalt plant at property owned by the Russell Corporation on the east side of Route 7B in Clarendon, Vermont. The Application includes the addition of an asphalt plant (cold feed hoppers, dryer, and stack), three fuel and asphalt cement tanks, and various roadway, drainage and other features designed to support the asphalt plant ("the Project").

As explained below, the Vermont Environmental Board ("Board") concludes that the Project conforms with Criteria 1, 1(B), 3, 5, and 10. The Board also concludes, however, that the Project fails to conform with Criteria 8, 9(B), and 9(K). Accordingly, the Board denies Permittee Land Use Permit Application #1R0849-EB.

Key conclusions of the Board include:

A. Criterion 1. The Board concludes that the Project will not result in undue air pollution based on its findings that the levels of noise generated by the Project will not result in undue air pollution, that the emission levels from the Project will not result in undue air pollution, and that the dust controls implemented on-site at the Project and off-site will minimize any air pollution caused by the project.

B. Criterion 1(B). The Board concludes that the project meets all applicable health and environmental conservation department regulations and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells.

C. Criterion 3. The Board concludes that the Project will not cause an unreasonable burden on any existing water supplies.

D. Criterion 5. The Board concludes that this project will not cause unreasonable congestion or unsafe conditions with respect to the use of highways.

E. Criterion 8. The Board concludes that the Project fails to satisfy Criterion 8 in that the Project will have an undue adverse effect on the scenic or natural beauty or aesthetics of the area.

F. Criterion 9(B). The Board concludes that the Project fails to satisfy Criterion 9(B) in that the Applicant has not satisfied subcriterion i and the mitigation proposed in this case is too vague and uncertain to be accepted.

G. Criterion 9(K). With respect to the public investments, the Board concludes that the Applicant failed to show that the Project will not unnecessarily or unreasonably endanger the public investment in highway facilities. The Board concludes, however, that the Project will not materially jeopardize or interfere with (a) the function, efficiency, or safety of these facilities, or (b) the public's use or enjoyment of or access to these facilities.

H. Criterion 10. The Board concludes that the Project complies with both the Town Plan and Regional Plan, and therefore, the Project complies with this criterion.

I. SUMMARY OF PROCEEDINGS

On June 21, 1999, Anthony Stout on behalf of the Applicant filed a land use permit application for the Project with the District #1 Environmental Commission ("Commission") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On December 7, 1999, the Commission issued its Findings of Fact, Conclusions of Law and Order of Denial of Permit ("Decision") denying the Applicant's permit application for the Project.

On January 6, 2000, the Applicant filed a Motion to Alter with the Commission.

On January 12, 2000, in reaction to the Applicant's Motion to Alter, the Commission issued its Memorandum of Decision on Motion to Alter ("MOD") which declined to alter the Commission's Decision.

On February 8, 2000, the Applicant filed a Notice of Appeal with the Board from the Commission's Decision contending that the Commission erred by finding that the Project fails to comply with 10 V.S.A. § 6086(a)(5), (8) and (9)(B) ("Criteria 5, 8 and 9(B)"). The Applicant also appealed the Commission's grant of party status to Mary and Albert Trombley, Helen Darby, Barbara Doty, Henry and Ilse Vergi, Marjorie Southard, Doris Roach, Shirley Loomis and Shelly Allen, Scott and Liza Stratton and F. Pierce and Ardis King. The Notice of Appeal was filed on behalf of the Applicant by Edward V. Schwiebert, Esq.

On February 22, 2000, Doris Roach, Ardis King, Frederick P. King, Scott C. Stratton, Lisa Stratton, Mary Trombley, Albert Trombley, Barbara Doty, Bernard Doty, Marjorie E. Southard, Helen W. Darby, Nancy Buffum, Carroll R. Buffum, Shirley W. Loomis, Shelly K. Allen and Henry Vergi (the "Neighbors") filed a Cross Appeal with the Board from the Commission's Decision contending that the Commission erred by finding that the Project complied with 10 V.S.A. § 6086(a)(1), 1(B), 1(G), (2), (3), (5), (8), (8)(A), (9)(K) and 10 ("Criteria (1), 1(B), 1(G), 2, 3, 5, 8, 8(A), 9(K) and 10"). The Neighbors also filed a Motion for Party Status on the same date. The Cross Appeal and Motion for Party Status were filed on behalf of the Neighbors by Mary C. Ashcroft, Esq.

On March 17, 2000, Board Chair Marcy Harding convened a prehearing conference with the following participants:

The Applicant by Mary Grady, Esq.
The Neighbors by Mary C. Ashcroft, Esq.
Doris Roach
Marjorie White Southard

On March 20, 2000, Chair Harding issued the Prehearing Conference Report and Order.

On March 21, 2000, the Neighbors filed a Supplemental Motion For Party Status for Ardis and Frederick P. King.

On March 23, 2000, Applicant filed its Response to Cross Appellants' Motions for Party Status and Cross Appeal.

On March 28, 2000, Neighbors filed an Objection to the Prehearing Conference Report and Order.

On April 12, 2000, Applicant filed its Response to Cross Appellants' Objection to Prehearing Conference Report and Order.

On April 13 and 21, 2000, the Board issued Memoranda of Decisions.

On May 9, 2000, Atty. Christopher White filed an Entry of Appearance on behalf of the Vermont Department of Agriculture, Food & Markets ("VDA").

On May 23, 2000, the VDA filed its List of Exhibits and Potential Witnesses; Neighbors filed their Motion to Present Live Testimony of Christopher White, Esq., their List of Witnesses, and their Exhibits N1 through N45; and Applicant filed its List of Witnesses and Exhibits A1 through A-49.

On June 27, 2000, the Vermont Agency of Natural Resources ("ANR") filed its Notice of Appearance on behalf of the Division for Historic Preservation ("DHP"), its exhibit list and Exhibits DHP-1 and DHP-2; Neighbors filed its Final List of Witnesses and Final List of Exhibits and Exhibits N46 through N61; Applicant filed its List of Rebuttal Witnesses, a Revised List of Exhibits and Exhibits A-50 through A-58; and the VDA filed a letter requesting that the Applicant serve the VDA with its filings.

On July 14, 2000, the VDA filed its Rebuttal List of Exhibits and Exhibits AG5 through AG8.

On July 18, 2000, Neighbors filed its Objections to Applicant's Evidence and their Proposed Findings of Fact, Conclusions of Law and Order and Applicant filed its Objections to Prefiled Testimony, and it's Proposed Findings of Fact.

On July 24, 2000, Neighbors filed Errata Pages 83 and 83a to replace page 83 of record 29b.

On August 8, 2000, Neighbors filed its Responses to Applicant's Evidentiary Objections, its Motion to Disregard Applicant's Proposed Findings and Conclusions of Law Beyond Page Limitations, and its Findings of Fact and Conclusions of Law regarding Subcriterion 9(B) and Applicant filed its Response to Cross Appellants' Objections to Prefiled Testimony and Exhibits and Proposed Findings of Fact.

On August 18, 2000, Applicant filed its Response to Cross Appellants' Motion to Disregard Applicant's Findings and Conclusions of Law Beyond Page Limitation.

On August 24, 2000, Attorney Ruth filed a Notice of Appearance of herself and Jacob Humbert on behalf of Department of Housing and Community Affairs ("DHCA").

On August 25, 2000, Applicant filed its Amended List of Exhibits.

On August 28, 2000, Chair Harding convened the second prehearing conference.[1]

On August 30, 2000, the Board convened a public hearing in this matter. As part of the hearing, the Board performed a site visit to the Project.

On August 30, 2000, Applicant filed a memorandum regarding the Federal Highway Administration's ("FHWA") Traffic Noise Model; DHCA filed its Closing Statement; and Applicant filed its Exhibit 16a.

On September 14, 2000, Neighbors filed its Objection to the FHWA Traffic Noise Model, its Closing Statement, its Supplemental Findings of Fact, Conclusions of Law and Order, and Request to Exceed Page Limitation, if Necessary.

On September. 15, 2000, DHCA filed its Proposed Findings of Fact, Conclusions of Law and Order and Applicant filed its Closing Statement, its Supplemental Proposed Findings of Fact and Conclusions of Law and Order, its Request to Enlarge Page Limit, and its Brief in Support of the Full Inclusion of the Testimony of Ken Kaliski.

On September 22, 2000, the Board issued a Memorandum of Decision overruling the Neighbors' objection to the prefiled testimony of Applicant's noise expert.

On September 22, 2000, Chair Harding issued a Memorandum to Parties regarding ex parte contact.

After recessing the hearing, the Board deliberated on September 20, October 18, December 6, 2000, and January 3 and 10, April 18, May 16, June 6 and 27, and July 10, 2001.

---

[1] During this second prehearing conference, Chair Harding ruled on the parties' evidentiary objections, overruled the Neighbors' Motion to Disregard Applicant's Proposed Findings of Fact and Conclusion of Law because they exceeded the Board's page limitations, and overruled the Neighbors' Motion to Allow the live testimony of Chris White of the VDA because Mr. White had prefiled testimony. The VDA withdrew its motion to take official notice of past Board decisions as it was unnecessary.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the board declared the record complete and adjourned. The matter is now ready for final decision.

II. ISSUES

1. Whether, pursuant to 10 V.S.A. § 6086(a)(1), the Project will result in undue air pollution.

2. Whether, pursuant to 10 V.S.A. § 6086(a)(1)(B), the Project will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into the groundwater or wells.

3. Whether the Project will cause an unreasonable burden on the water supply currently utilized by existing residences under 10 V.S.A. § 6086(a)(3).

4. Whether, pursuant to 10 V.S.A. § 6086(a)(5), the Project will cause unreasonable congestion or unsafe conditions with respect to use of highways.

5. Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

6. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(B), the Project will not significantly reduce the agricultural potential of the primary agricultural soils, specifically in failing to conform to subcriteria (i), (ii) and (iii).

7. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(K), the Project will unnecessarily or unreasonably endanger the public or quasi-public investment in the area’s highways or materially jeopardize or interfere with the function, efficiency, or safety of, or the public’s use or enjoyment of or access to the area highway.

8. Whether, pursuant to 10 V.S.A. § 6086(a)(10), the Project is in conformance with the Clarendon Town Plan and the Rutland County Regional Plan.

III. FINDINGS OF FACT

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. *See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

The findings of fact below are organized into a general section followed by sections related to the specific issues. Because many findings are relevant to more than one issue, the findings should not be read as applicable only to the specific issue(s) under which they are contained. Where findings from the general category or another specific category are relevant, they are assumed and not repeated.

A. General Findings

1. The John A. Russell Corporation is the owner of an existing permitted gravel stone quarry, the Crushed Rock quarry located on Route 133 in Clarendon. As an extension of its gravel and stone business, the John A. Russell Corporation proposes the introduction of the Project, also known as an asphalt concrete or hot mix plant to be located on Route 7B in the Industrial District of the Town of Clarendon, Vermont.

2. The proposed site for the Project is on the east side of Vermont Route 7B (“VT 7B”) and east of U.S. Route 7 (“US 7") in the Town of Clarendon. The parcel is 10.5 acres in size.

3. The location lies less than six miles from the central core of Rutland City, the second largest population center in the state.

4. The site is L-shaped, with approximately 250 feet of frontage on Route 7B, and is 1,050 feet deep. A thick tree line, labeled as "The Lane", divides the long access portion on the north side from the squared off portion to be utilized as the plant site on the south side. The plant site is approximately 450 feet wide and 500 feet deep. These dimensions are shown on the site plan. This site is located in an area designated in the 1995 town plan as industrial. The site has been identified as an industrial area since 1979.

5. The plant model proposed is a "Titan 3000." The components include a feed hopper, a rotary drier, a bag house, a batch tower, storage silos, and a control room. In addition, there is a truck scale, scale/lab building, vault privy, 10,000 gallon diesel fuel storage tank, two 15,000-gallon asphalt cement storage tanks, and a truck wash rack with a release agent tank. There will be storage piles of aggregate, including various sizes of stone and sand. All of these items will be located in the southern portion of the site, surrounded by a chain line security fence and are shown on the site plan.[2]

6. The Project will be located at the bottom of the property in order to lower the elevation of the plant to the greatest extent practical. In addition, a berm will be built on the west and south of the property. The applicant has proposed to plant white pines, staggered, along the top of the berm to screen the asphalt plant from various viewpoints. On the north end, an existing tree line will be preserved and will be broken only to allow the paved road, providing access to the asphalt plant, to be built. In addition to that existing tree line, a series of pines will be planted to further mitigate visual impacts. The asphalt plant will be located approximately 700 feet from Route 7B. The plant will be surrounded by an 8' high chain link fence measuring approximately 500' long and 400' wide. All of the raw product for the asphalt plant will be trucked in from off site.

7. The site also will be improved with two 15,000 gallon asphalt cement tanks and one 10,000 gallon #2 fuel tank. The tanks will be located within containment systems in order to prevent the release or spill of the contained material.

8. The facilities will operate from 6:30 a.m. to 8:30 p.m. Monday through Friday and 9 a.m. to 1 p.m. on Saturday. During the hearing, Applicant agreed to a condition that the Project will operate within these hours and only during daylight hours, whichever is shorter.

---

[2] The Board has conflicting evidence from the Applicant as to whether the Project includes two 15,000-gallon asphalt cement tanks or one 20,000- gallon tank. As the application lists and site plan shows two 15,000-gallon tanks, the Board finds that the testimony addressing a 20,000-gallon tank is erroneous.

9. The Applicant is proposing to produce up to 150,000 tons of asphalt mix each year. The maximum 30 day production volume would be 25,000 tons. The maximum 7 day volume would be 8,000 tons. The maximum one day production volume would be 2,750 tons. The Project will be implemented in a phased approach with a maximum first year production of 100,000 tons, followed by 125,000 and 150,000 ton annual maximum production in years two and three respectively.

B. Criterion 1 (Air Pollution)

10. The ANR Air Pollution Control Division issued Applicant Air Pollution Control Permit ("Air Permit") number AOP-99-006 on October 13, 1999.

11. The Air Permit imposes conditions on the Applicant to control dust and other particulate emissions including the following:

> The facility is required to take reasonable precautions at all times to control and minimize emissions of fugitive particulate mater form the operations at the facility. This includes but is not limited to the following:
>
> ...The paved portions of the haul road and traffic areas shall be periodically sprayed with water and swept to prevent buildup of aggregate material that may generate fugitive dust emissions...
>
> ...the covering of all trucks owned or operated by the Operator of the facility which travel on public roadways while loaded with materials that may generate fugitive dust emissions such as aggregate and asphalt.

12. Potential air pollution from the Project includes noise, dust, vehicle emissions and odors.

C. Criterion 1(B) (Waste Disposal)

13. There will be fewer than five employees at the Project site and the Project operation will be seasonal.

14. The Project includes a pit privy with a plan to haul the sewage off-site for disposal.

15. There will be a maximum of 326 daily truck trips to the Project site and the truck drivers will be told not to use the on-site toilet facilities, however, there may be emergency use of the facilities by drivers.[3]

16. The ANR approved the pit privy design and issued the Water Supply and Wastewater Disposal Permit for the Project on July 27, 1999.

17. The stormwater drainage system for the Project is designed to prohibit a rate of runoff above the existing natural conditions and to prevent contaminants from reaching the groundwater system.

18. The existing site drains in an easterly direction. In accordance with the Vermont Stormwater Regulations, the Project site is designed so that the post-development rate of runoff from a two-year storm, which is 4.4 cubic feet per second ("cfs"), is less than or equal to the predevelopment rate of runoff of 5 cfs.

19. The Project has a wet basin designed with the outlet above the bottom of the sedimentation pond to allow for anaerobic digestion of organic sediments. Any trace amount of volatile petroleum products that might be contained in stormwater runoff will stay on the surface of the pond and be broken down by sunlight. Any inorganic sediments are trapped in the basin and removed during maintenance activities.

20. These sediments will be removed on a yearly basis and taken to a licensed solid waste disposal facility.

21. Along the entrance roadway, grassed swales have been provided to filter the stormwater runoff prior to discharge. Sediments are retained in the swales and removed during maintenance activities. Any trace amount of petroleum products that may originate from the roadway will be retained on the leaves of vegetation and will be broken down by sunlight. Any

---

[3] The Board has conflicting evidence on the maximum number of one-way truck trips. The Applicant's application lists 325 as the maximum number and Applicant's traffic studies prepared by expert witness Kaliski states 326 trips.

potential contaminants from motor vehicles will be conveyed by stormwater runoff to the detention basin and will be contained and treated.

22. A Stormwater Discharge Permit was not required for the Project site. The Project was reviewed by Carol Carpenter, Environmental Engineer, with the Wastewater Management Division of the ANR Department of Environmental Conservation and was found to not require a permit since the stormwater from the Project does not enter waters of the state.

23. The fuel and asphalt cement tanks for the Project have been designed with tertiary containment. First, the liquids are stored in steel tanks. Second, each steel tank has a secondary steel containment saddle tank that is design to hold more than the volume of each individual tank. Third, these tanks are located on a walled portland cement concrete slab that has a containment volume equal to 125% of the sum of the volume of all the tanks. All tanks and storage facilities are designed to meet 40 CFR Part 112, Spill Prevention and Control and Countermeasure.

24. The petroleum products will be delivered to the site in properly designed and maintained vehicles. If the Applicant observes any lapses in the proper handling or movement of the products, the Applicant will terminate the use of the offending deliverer. The tanks are located within containment barriers, which permit delivery of the petroleum products within the containments.

25. Any leaks or spills will be retained on-site, within the operating areas, and not released to the environment. The Applicant has adopted a Spill Control and Countermeasures Plan. In the event of an unplanned spill, measures will be in place to contain, clean up, and remedy the situation without off-site impacts or impacts to the surface or groundwater.

26. The release agent sprayed on the truck bodies is an organic material made from citric acid and water and is not harmful to the environment.

27. Potassium chloride, a water soluble compound, is proposed for deicing the access driveway during winter months. Sand is a potential substitute for potassium chloride. Although the plant will not operate, aggregate hauling may occur.

28. The nearest well to the facility is more than 500 feet away and up gradient from the site. The Applicant's consultant has researched the well records of the ANR Water Supply Division and has determined that there are no wells down gradient from the site within the stormwater runoff path.

29. Hydric soils found at the Project site have low permeability and contain organic matter that is normally in some stage of decay. Hydric soils promote vegetative growth and biological conditions that aid in the conversion of hydrocarbons. Hydric soils are normally found in a layer on top of even more impermeable soils, which means that surface water is retained in the hydric soils because it cannot permeate through the underlying soils. Underneath the soils on the Project site are extremely dense, glacial tills. These dense, glacial tills will prevent migration of trace components which are not already dissipated on the surface.

30. Drilled wells are characterized by being cased with water tight pipe through the overlying soil layers with the casing being sealed to the bedrock below. This method is used to prevent surface waters from entering the well. The source of water in a drilled well is from a bedrock fissure that carries water. Drilled wells receive their source of water from below ground in an aquifer that is not part of the surface water aquifer above. Based upon the combined processes of grass filtering, conversion and absorption by the sun's rays, filtering of the hydric soils, and the natural impermeable barrier created by the dense glacial till soils, no trace petro-chemical components will reach any underground aquifers in the Project area.

31. The majority of the stormwater currently flows in an east southeasterly direction off of the existing Project site. When the project is developed, the majority of the storm water will continue to drain in an east southeasterly direction.

32. The Allen/Loomis/Darby properties are located to the north of the project. Only a small area in the northwest corner of the site currently drains to the northeast. This portion of the Project site will not be altered in any way. Therefore, the proposed project will not in any way change or increase the natural flow of water from the Russell property onto the Allen/Loomis/Darby properties.

33. The western end of the site near the proposed entrance road does not presently drain off site as it is surrounded by higher ground. The drainage at the western end of the site will not be redirected by the proposed project.

34. The proposed berm along the western side of the site will not create a dam or cause ponding of stormwater above it. The proposed berm is designed to shield the proposed use from view. The berm has been carefully designed so that it will not impound water. The toe of the berm is sloped to the south so that any surface water flow will be directed around the berm and to the east. The water flow will be directed to continue in the same direction as it presently flows.

D. Criterion 3 (Burden on Existing Water Supplies)

35. Potable water will be provided as bottled water.

36. Non-potable water will be provided from a new drilled well.

37. There will be no stone washing at the Project site and the Project itself will not have a large water demand.

38. The Project does not include truck washing. Asphalt trucks will be sprayed with citrus prior to being loaded.

E. Criterion 5 (Traffic Congestion and Safety)

39. The Applicant has agreed to limit the number of total truck trips to 38 trips (19 loads) during the afternoon peak hour (4:00 to 5:00) so as to reduce potential impacts on congestion of adjacent street traffic during that peak period. During the remainder of the day (outside of 4:00 to 5:00 pm), there is no proposed restriction on hourly vehicle trips to or from the facility but the Applicant has agreed to a maximum of 48 trips per hour.

40. The Clarendon Planning Commission approved 212 truck trips per day. Applicant seeks a permit for 326 truck trips per day.

41. The current average daily traffic on VT 7B is approximately 540 vehicles, 11 of which are heavy trucks.

42. Truck trips for aggregate deliveries will be limited to 50 trips on peak asphalt production days.

43. Truck traffic to the Project will access and exit the plant via US 7 and VT 7B from the north only.

44. Truck traffic to the Project, i.e. deliveries of aggregates, in the off-season is limited to weekdays between 7:00 am and 3:30 pm, however, during asphalt production, aggregate deliveries are proposed for the Project operating hours of 6:30 am to 8:30 pm, or during daylight hours only, whichever is shorter.

45. Aggregate will be hauled to the Project in tandem and tri-axle trucks.

46. Asphalt will be hauled from the Project in 16 wheel paving trucks, similar to dump trucks, and in a limited amount of flow-boy trucks, similar to tractor trailers.

47. Applicant proposes to monitor truck trips by count and weight at the Project's truck scales.

48. The sight distances at the intersection of VT 7B and US 7 are greater than 2000 feet in both directions. The sight distances are long enough for truck drivers to make safe judgments before turning onto US 7 from VT 7B.

49. The intersection of VT 7B and US 7 has a low accident history.

50. Trucks will not cross the center line of Route 7B when exiting the Project. Truck turning will be regulated by signs instructing the drivers. The Project's exit will have a three-centered compound curve to allow a turning radius so that even the largest trucks can exit on to VT 7B without moving into the on-coming traffic lane.

51. The level of service analyses at US 7/VT 7B were conducted for the 2000 and 2005 No-Build and Build conditions. Overall levels of service were LOS "A" in all Build scenarios. For vehicles exiting from VT 7B onto US 7, the PM peak hour level of service was LOS B under Build conditions.

For vehicles making a southbound left turn from US 7 onto 7B, the level of service is LOS "A" under all Build scenarios.[4]

52. According to the Vermont Agency of Transportation ("VTrans") level-of-service policy, LOS "C" is acceptable.

53. The existing levels of service were confirmed by measuring the actual delays vehicles experienced over a one hour period during the PM peak hour of traffic. The actual average delay observed in the field study for exiting VT 7B eastbound was 11.2 seconds. This is comparable with the study's 2000 no-build estimate of 9.5 seconds. Similarly, making a southbound left into VT 7B from US 7, the actual delay measured less than 7.5 seconds while Applicant's level-of-service calculations predicted 9.0 seconds. The field studies confirmed that existing levels of service are at LOS "A" or "B", and that vehicles are not significantly delayed at this intersection. They also validate the model used to forecast future conditions.

54. During the traffic study, pedestrians along VT 7B were counted. Pedestrian traffic was observed during the weekday PM peak hour and at other times during the day. From a vantage point where approximately 1,500 feet of VT 7B could be observed, no pedestrian activity was seen.

55. The traffic study showed that traffic will not build up going southbound to make a left turn into VT 7B nor will queues extend into the through lanes on US 7. The calculations show a 95th percentile queue length of 50 feet. There is 270 feet of available storage, enough for four to five trucks. In addition, during the peak hour of the peak day of the operation of the facility, only 24 entering trucks are expected. Given the nature of the operation, these would be spread out throughout the hour, generating an average arrival time of one every 2.5 minutes. Given an average delay of nine seconds, it is very unlikely that more than one or two trucks would be queued up at the approach.

---

4 Applicant's prefiled direct testimony of its traffic expert Kenneth Kaliski states level of service for "VT 7A," however, Applicant's traffic study analyzed traffic conditions relating to "VT 7B." Accordingly, the Board believes that the reference to "VT 7A" in Mr. Kaliski's testimony is simply a typographical error.

56. VTrans accident data shows that accident rates at intersections in the study area are lower than average, available corner sight distances are higher than VTrans guidelines, and queues will not extend to a condition that would create a hazardous situation.

57. The total paved width of VT 7B meets VTrans standards. For a road with an average daily traffic of 600 vehicles and a speed of 45 mph, the VTrans standard for new roads and reconstructions is 9 foot lanes with 2 foot paved shoulders, or a total width of 22 feet. At VT 7B's narrowest point (north of the site), VT 7B has a 10 feet 2 inch lane with a 1 foot 1 inch shoulder on the west side and 11 feet 7 inch lane and 1 foot 4 inch shoulder in the east lane for a total paved width of 24 feet 2 inches. In addition at this point, the road has an additional 3 feet 8 inches in total of unpaved shoulder.

58. VTrans classifies VT 7B as a Major Collector. The American Association of State Highway and Transportation Officials "Policy on Geometric Design" (1994) defines Major Collectors as follows: "These routes (1) serve county seats not on arterial routes, larger towns not directly served by the higher systems, and other traffic generators of equivalent intracounty importance, such as consolidated schools, shipping points, county parks, and important mining and agricultural areas: (2) link these places with nearby larger towns or cities, or with routes of higher classifications; and (3) serve the more important intracounty travel corridors."

F. Criterion 8 (Aesthetics)

59. In the surrounding area, starting at Route 7B as it extends south from Route 7, there is a car dealership (Byrne) to the west followed by an unused sawmill.

60. To the east of VT 7B, the Southard/White residence, formerly an active dairy farm, includes a small farm stand and associated flower, fruit and vegetable gardens and barns. This parcel is large and mostly open. Part of this parcel is cut for hay. It extends southerly from the intersection of 7 and 7B to the north boundary of the Project site and easterly to the railroad.

61. Further south on the west of VT 7B is a mobile home, followed by a former cabin colony that has been converted to numerous housing units and an older adjacent house, all apparently belonging to Dezaro.

62. The next property south on the west side of 7B is the Johnson's, which contains two houses, the northerly one being opposite the entrance to the Project.

63. Continuing south, the next parcel on the east is McGrath (Yea Barn) which is a rental property.

64. The Doty property has a small house near VT 7B, just south of the Yea Barn, 780 feet west of the Project.

65. The next house south of Doty's is the Rockwell property.

66. Across from the Rockwell property, on the west side of VT 7B is an open field extending to the Pepsi-Cola distribution plant.

67. On the east of VT 7B is an open field used by Trombley to pasture horses.

68. On the west of VT 7B, next to the Pepsi-Cola distribution plant, is another open parcel.

69. On the east side, is a private drive, Trombley Lane, leading to the residences of Trombley, Stratton, and Kalikowski.

70. The Stratton's residence is 1,375 feet southwest of the Project. The Trombley's residence is 1,120 feet south-southwest of the Project.

71. The Kalikowski residence is the last one on the Trombley Lane and is set back from the road in a wooded area.

72. The Jewett residence faces VT 7B and is adjacent to Trombley Lane. The residence also houses a small engine repair business.

73. The Industrial District extends from the intersections of Route 7 and 7B to the north, easterly to the active railroad line. The Industrial District boundary follows the railway line southerly, before heading southwest to

VT 7B south of the Kalikowski property, crossing VT 7B to the west. It includes the lands along the tree line (paralleling US 7 and VT 7B), including the two open fields on either side of the Pepsi Cola distributing plant and the Johnson property before returning easterly to VT 7B along the Johnson north property line.

74. There is a CVPS 46 kV transmission line that crosses the Industrial District and the Project site.

75. The topography of the area includes the highest point in the area around the Johnson property. The land then falls away to the northwest and southeast to wooded low lands backgrounded by intermediate hills in the middle distance that exhibit some development and mobile home residences.

76. The character of the area includes agricultural, residential, commercial and industrial uses. There are other areas zoned and actively used as industrial districts to the north and south. The area is accessible by US 7, the railroad, and the airport.

77. The area along the middle section of VT 7B has been zoned industrial since 1979. The area along VT 7B containing the Project site was one of 5 areas in Clarendon changed to industrial, with each area subject to a town vote on January 30, 1979. The 1995 town plan designates this area along the middle section of VT 7B as industrial, with language discouraging residential use.

78. During the site visit the Board observed the area as relatively quiet, pastoral, and scenic.

79. The nearest commercial use is a Pepsi distribution facility on the west side of VT 7B. The Pepsi facility is a low profile light industrial or commercial use with low aesthetic impacts.

80. The area is in a commercial and industrial corridor extending from Rutland City to the Rutland State Airport. The immediate area around the Project site includes residential and agricultural uses with some commercial properties. It is centrally located near Rutland City, yet not

adjacent to any heavily populated areas. It is near the state airport. It has close access to Routes 7, 4, and 103, the major arterial highways connecting to the Rutland area. It borders on an active rail line. The sewer line from the airport to Rutland runs along Route 7B.

81. Neither the Town Plan nor the Zoning Regulations includes a clear written community standard regarding aesthetics or scenic beauty applicable to this industrial site. No standards or even types of industrial uses are presented for the general area or for the area specifically zoned for industrial use.

82. The Project is sited on the lowest part of the site, which partially screens the proposed structures from view.

83. Two berms with plantings of evergreens on top will be constructed to further block views of the structures. These berms further reduce the visibility of the structures from VT 7B and the abutting and surrounding properties. The berms will be constructed from material excavated from the work yard in which the Project will be located.

84. The berm to the west will rise from the working floor at an elevation of 674 feet to an elevation of 699 feet or a height of 25 feet above the lower grade. In relation to the existing grade in the field behind the Big Red Barn and trailer site (Yea Barn), the berm will be 9 feet above grade on the north end and 21 feet above the existing grade on the south end. The berm will be heavily planted with 6 to 10 foot white pines in an irregular planting averaging 15 feet on center.

85. The berm on the south side of the excavated floor varies from 5 feet to 8 feet above the existing exterior grade along the south property line. This berm will also have pine plantings of 6 to 10 foot pines with an average spacing of 15 feet on center.

86. These berms and plantings are proposed to block the lower half of the asphalt plant structures, and reduce or eliminate the view of the upper half of the plant when viewed from VT 7B and the residences along VT 7B.

87. The Project is likely to be more visible from the Trombley property and the Stratton property to the south because of the lower intervening land between those houses and the Project. The pine tree plantings are

intended to reduce the view of the of the plant even from those properties.

88. The larger berm to the west has tree plantings. This berm is intended to obscure the trucks and the major part of the operation and to reduce the noise of the plant, trucks, and loading activities.

89. The former White farmhouse, currently the home of Ms. Southard, is over the hill from the Project site with two lines of tree growth reducing the view of the Project.

90. The Project will be visible from the edge of the Allen and Darby property, which extends to the proposed access drive.

91. To mitigate these possible views through the dense trees and hedgerow on the east side of VT 7B and to provide a screen for the surrounding property, a tree line planting is planned along the north side of the access road.

92. In the twenty-five feet between the road and the property line, thirty-eight 6 - 8 foot white pine will be planted to reduce the visibility of trucks traveling the access road.

93. Along the south side of the access road, six pines and six willows will be planted. The willows will be located at the near the entrance of the road in an existing wet area. The pines and willows supplement the existing growth along "The Lane" which is to be retained. The existing trees and shrubs provide a screen for the asphalt plant from the north and a background for views from the south.

94. The planted slopes on the west and south faces of the berms are proposed to be 1 on 3, or 1 foot vertical rise to 3 foot horizontal run. This is a slope that is mowable and readily plantable with the size trees the landscape plan calls for. This is typically a slope that will readily support a quick stabilization from conservation grasses by the use of the topsoil on site. This topsoil will have water retentive capacity to support normal growth of trees as well as provide the necessary nutrients to establish a quick cover with little erosion. On site topsoil will be used in the tree planting pits, which will be dug 3 feet greater than the rootball to insure the establishment of the fast growing evergreens.

95. These trees will mature in 5-8 years, and they will present a solid wall of green not unlike the present edge of the evergreen woods beyond. At that time, the berm itself will not be evident.

96. The color of the asphalt plant will be light tan to blend into the colors of the surrounding area.

97. Noise will be minimized by the circular movement of the vehicles through the plant and the use of "radar" back-up alarms that will not sound unless required in the presence of an obstacle.

98. Baffles enclosing the asphalt plant's equipment are further noise mitigating devices.

99. The plant yard and access road will be paved to mitigate dust.

100. Equipment lights will be used only when needed. The lighting is low-angle cutoff, which will reduce the horizontal spread of light and glare from the fixture. Lights will be on a timer for reduced night levels commensurate with security and safety with the exception of limited night operations on an emergency basis for nighttime highway construction.[5]

101. For travel on Route 7B, the plant is not in the normal cone of vision; it is blocked by existing trees and brush and existing structures.

Aesthetics - Air Pollution

102. The Air Permit restricts the operation of the Project so that it complies with the U.S. Environmental Protection Agency ("EPA") and ANR Secondary Ambient Air Pollution Standards.

103. The Air Permit restricts odors and other fugitive emissions emanating from the Project.

104. The Air Permit requires the Project to meet all of Vermont's Hazardous Air Pollutant emissions regulations.

---

5 The Applicant stated that he would agree to a permit condition that barred any nighttime operations, even those necessitated on an emergency basis.

105. The Air Permit insures that air pollution levels around the project do not significantly deteriorate as a result of the Project.

106. The Primary and Secondary Ambient Air Pollution Standards are a part of the National Ambient Air Quality Standards (“NAAQS”). The NAAQS were developed to protect the public health and welfare with an adequate margin of safety. "Primary Standards" are those intended to protect public health and "Secondary Standards" are those intended to protect public welfare.

107. "Public welfare" is defined by the Clean Air Act to include, but not be limited to: "effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants" (Section 302 (h) of the CAA).

108. The "Secondary Standards" relate to all potentially negative effects of air pollutants other than human health effects. For example, the Secondary Standard for particulates is set such that there is no significant contribution to atmospheric haze or the soiling of buildings. Both are aesthetic impacts.

109. To obtain an air pollution control permit from the ANR, a source has to demonstrate that it complies with both Primary and Secondary Standards. Any source with potential emissions greater than 10 tons per year must be evaluated by the use of an EPA approved air dispersion computer model to assure compliance with the both primary and secondary ambient air quality standards.

110. The emissions from this facility that have the potential to exceed 10 tons per year are nitrogen oxides (NOx) and sulfur dioxide (SO_2). Each pollutant has been modeled, following EPA and ANR protocols, to determine the highest ground level concentration of each pollutant.

111. Other nearby sources are included in the model only if annual pollution emissions are above "significance" levels set by the EPA. Since none of the pollutants from the facility were emitted in sufficient amounts to be

"significant", Applicant was not required by ANR to conduct modeling of any other facilities. Given the proximity of the Pike asphalt plant to the north in Clarendon, the Applicant voluntarily included this facility in its modeling. The ANR provided the Applicant with maximum emission rates from that facility and plant characteristics, and these parameters were used in the modeling.

112. The modeling performed for the application, and approved by the ANR, shows the following results:

Pollutant	Averaging Period	Modeled Concentration (micrograms/ cubic meter)	NAAQS (primary and secondary standard (micrograms/ cubic meter
NOx	Annual	6.2	100
SO_2	3 hr 24hr Annual	453 176 4	1,300 365 80

The results of the modeling show that, with the operation of the facility at maximum levels, the surrounding area will meet all primary and secondary standards with an adequate margin of safety. As such, the facility will not contribute to soiling of buildings, haze, or other secondary aesthetic impacts, will not harm soils, crops and other vegetation, and will adequately protect public health, even assuming the maximum potential operation of the Project.

113. To receive a permit from the ANR, an applicant must not only demonstrate that the primary and secondary standards are met, but in addition, must show that the source does not significantly *deteriorate* air quality as well. This prevents a relatively clean area like Vermont from experiencing deteriorating levels of air pollution to levels that are close to health standards.

114. The results of the modeling showed that pollutant concentrations resulting from the Project will be below the "Prevention of Significant Deterioration" increment standards and the primary and secondary NAAQS.

115. Vermont has stricter rules regarding hazardous air contaminants than the EPA. The ANR estimated the amount of hazardous air pollutants that would be emitted by the Project and the associated diesel trucks under maximum operation and determined that the facility would not be subject to Section 5-261 of the Vermont regulations.

116. If at any time in the future additional information regarding the emissions of hazardous air pollutants from the Project becomes available, the permit may be reopened.

117. The Project will be equipped with several different devices that will reduce emissions. These include:

1) Water spray bars or enclosures on the conveyor transfer point to reduce fugitive dust emissions.

2) Small pressure relief nozzles on asphalt storage tanks to reduce VOC emissions

3) A cyclone to remove large dust particles from the exhaust stack.

4) A baghouse to remove both small and large dust particles.

In addition, other permit restrictions include:

1) A limit on the use of high-VOC asphalt

2) Restrictions on the use of petroleum based release agents on truck beds.

3) An emissions test for particulate matter must be submitted to the ANR for review.

4) Annual tests of the baghouse to detect small tears.

5) Continuous pressure monitoring of the baghouse to detect rips.

118. The facility is required to control dust from its haul roads.

119. The access road will be paved.

120. The Air Permit restricts nuisances and odors that could affect neighbors around the property. The permit states that the Applicant may not, "discharge, cause, suffer, allow, or permit from any source whatsoever such quantities of air contaminants or other material which will cause injury, detriment, nuisance or annoyance to any considerable number of

people or to the public or which endangers the comfort, repose, health, or safety of any such persons or the public or which causes or has the tendency to cause injury or damage to business or property. The owner/operator shall not discharge, cause, suffer, allow or permit any emissions of objectionable odors beyond the property line of the facility."

121. If neighbors complained of off-site odors from the Project and if the ANR determined that the odors were objectionable, the Project could be closed or more likely, the ANR would issue an order to eliminate the odor. If the Applicant could not eliminate the source of the odor, then the ANR could close the plant down for violating its permit.

122. The facility emits water vapor from its stack. During cold days or mornings with high dew points, that vapor could condense, creating a visible plume.

123. The plant will be closed during the winter (December 1 through April 30), and therefore, substantial water vapor plumes will be uncommon.

124. Any such plumes will be of water vapor, not smoke or other emissions, that could have other secondary impacts.

125. Stack exhaust is emitted into the atmosphere at a velocity of 55 feet per second and at a temperature of 270 degrees Farenheight. When exhaust from the plant stack reaches the closest property line, it is at least 130 feet above the land, not at ground level. There will only be a small amount of particulate in the plume and it will be of a size (less then 10 micrometers) that it will not readily settle.

126. The NAAQS protect crops as well as human health, and the emissions from the plant and resulting ground level concentrations are below those standards.

127. Indirect source permits are required only for facilities with more than 1,000 parking spaces or those that exceed 1,000 spaces and are increasing by more than 500 spaces. This Project does not require an indirect source air permit.

128. The most visible emissions from operating trucks is the black smoke that some trucks produce from their exhaust stacks. The smoke consists of small particles of mostly carbon that is generated by incomplete

combustion of diesel fuel. New trucks are equipped with electronic fuel injection, which uses a computer to control exactly how much fuel enters the cylinders. Thus, the engine receives only the required amount of fuel, resulting in complete combustion and little, if any, smoke.

129. Particulate emissions also are declining as a result of changes in fuel sulfur content. Reductions in fuel sulfur alone resulted in a reduction of particulate emissions from trucks by 40%. Furthermore, stricter U.S. EPA requirements have reduced the emission of particulates from new trucks by 80% overall since 1990.

130. As carriers replace their older trucks with modern fuel-injected trucks, fleet-wide emissions will decline. Overall, fleet emissions will approximately halve between 2000 and 2007.

131. There are not enough trucks and other vehicles traveling on VT 7B either now or with the proposed Project to generate enough pollution to cause any health problems.

Aesthetics - Noise Pollution

132. EPA guideline levels suggest that exposures of 75 dB(A) or more over an 8-hour workday for 10 years may create some hearing loss.

133. OSHA standards require hearing protection when levels exceed 85 dB(A) time weighted average.

134. The operation of the facility will not create a level of sound that could adversely affect people's hearing.

135. EPA also suggests a guideline level of 55 dB Ldn that will protect public health and welfare with an adequate margin of safety. The guideline suggests that this level will not cause activity interference outdoors at locations described as "residential with outside space and farm residences."

136. "Ldn" is the "day-night" average sound level. To calculate Ldn, one measures sound over the course of a typical day. 10 dB is added to the nighttime levels, then the resulting hourly sound levels are averaged.

The Ldn therefore represents a weighted average sound level over the course of a typical day.

137. The sound levels produced at the asphalt plant will not exceed 55 dB Ldn at the neighboring homes along VT 7B.

138. Data from the manufacturer on the plant proposed for this site in North Clarendon show that the maximum sound levels from the plant should be approximately 62 dB(A) at 500 feet.

139. The loudest piece of equipment, the rotary dryer, will be placed at a base elevation of 677 feet ASL, while the top of the berm is at 699 feet. This 22-foot elevation difference will help to attenuate noise transmission to neighbors directly across the street. While the closest property line is 100 feet from the rotary dryer to the east, the closest homes across VT 7B are approximately 800 feet to the west.

140. To further mitigate noise, trucks entering the site will be routed in a fashion to avoid backing and sounding alarms, and earth-moving equipment permanently assigned to the site will be fitted with so-called radar back-up alarms so as to avoid sounding except when circumstances or conditions warrant.

141. The sound level from the asphalt trucks operating on VT 7B was calculated using the FHWA "Traffic Noise Model." The impacts on "listeners" 50 feet, 75 feet, and 100 feet away from the centerline of the closest lane was measured. The design hour (PM peak hour), the maximum permissible truck volume for the PM peak hour, was measured using the same assumptions shown in the traffic report with regard to traffic volumes. The results in one-hour Leq's are shown below:

Distance from closest lane centerline	**No Build (dBA)**	**Build (dBA)**
50 feet	55	62
75 feet	52	60
100 feet	52	59

142. The results show a 7 to 8 decibel increase in highway traffic noise as a result of the Project.

143. The VTrans Noise Abatement Criteria shows the levels of sound that would require the investigation of construction of noise barriers on new highway projects. A level of 67 dB(A) (Leq (hourly)) is acceptable in "picnic areas, recreation areas, playgrounds, active sports areas, parks, residences, hotels, motels, schools, libraries, churches, and hospitals."

144. The sound levels on VT 7B after the Project is operating would not exceed 62 dB(A).

145. Figure 1 of the Noise Abatement Criteria shows the effects of an increase in sound levels relative to the ambient levels. It shows four categories of increase — None, Minor, Moderate, and Substantial. For a background level of between 52 and 55 dB(A), an increase of 7 to 8 dB(A) represents "None." As such, the Project would meet VTrans noise abatement criteria for highway noise.

146. Mr. King lives at Pierce's Corner at the intersection of VT 103 and VT 7B. He is approximately one mile south of the Project. Because trucks will be routed north on VT 7B and given the distance between his home and the Project, he should not be affected by noise from the Project.

147. The sound level measurements made by Ms. Southard did not follow standard practices for environmental noise monitoring. The duration of measurements, type of meter, accuracy of meter, presence of wind screens, meter response, and summary statistics of the measurements (Leq, Lmax, etc.), are unknown.

Aesthetics - Wildlife

148. At its closest point, the project parcel is approximately 500 feet from the wooded area where Vermont Fish and Wildlife Department has mapped a deer wintering area deeryard.

149. The Plant would not be in operation during the winter period when deer are likely to use the deeryard, however, aggregate deliveries to the Plant could occur.

150. The wildlife of the Project area includes deer, small mammals, and resident as well as migratory birds typical of a Vermont field and forest environment.

Aesthetics - Historic Sites

151. The Project area is sensitive for prehistoric period Native American sites. Surface collection after plowing, as recommended by the DHP, would be a cost-efficient first step to determine the presence of such sites.

152. There is a mound in surrounding area of the Project that is potentially special or possibly sacred. This mound is located outside the Project property and beyond any direct impact by the Project.

153. Scott Dillon of the DHP examined the mound and found no artifacts in the debris dug out by animals.

154. Crown Point Road may be in the Project area. The Walling's 1860 wall map of Vermont indicates that the eighteenth-century Crown Point Road ran east of Route 7B.

155. In 1861, Elias Hall wrote to the *Rutland Herald* about the Crown Point Road. He stated, "My attention was called to this subject by Mr. Hager, the State Geologist, calling on me to inform him where it was. I said to him I had a general knowledge of the route, but could not answer the direct question. He then said he must give up finding it on the west side of the mountain; he could trace the road to Mt. Holly and no further. He then told me the object of the inquiry, which was that a new State map was in progress, and he wanted to have the track of the old French road appear on it across the State".

156. Mr. Hall wrote that the 1759 road passed from the Rutland Fort south over four miles and then turned east past the Bowman place, which once stood south of the Project area on VT 7B. This matches the 1759 road shown on maps prepared by the Crown Point Road Association.

157. The Walling-Hager 1860 map shows the old military road as a dotted line next to what is now VT 7B. The Crown Point Road Association shows the 1777 route either in or west of the highway. It is likely that Walling-Hager's military road placement is more symbolic than actual.

158. The Project area potentially contains possible site components related to early cabin sites, early farmsteads, and later nineteenth- and twentieth-century farmsteads, primarily those of the Weeks family.

159. Scott's 1854 map, Walling's 1860 map, and Beers' 1869 map do not show any structures on the east side of VT 7B.

160. The feature identified as a "cultural terrace," south of the access road on VT 7B, is located outside any area of Project impact. The only direct impact to "The Lane," probably an old cattle path between VT 7B and a pasture, will be where the proposed access road crosses it.

161. Archaeological investigation of the old cattle path would not provide much insight into nineteenth-century agricultural practices.

162. It is possible that the site could contain Native American artifacts. As a precaution, the DHP has asked that any permit contain conditions requiring the Applicant to conduct an archaeological assessment of the area south of "The Lane". If any archaeological sites are found, then mitigation measures would be required as part of developing the site.

163. The DHP requests that the assessment be done by plowing the field and looking for artifacts. If nothing significant is found, that is the end of the issue. If something is found, a plan would be developed either to protect the object or study it before development proceeds. In either case, the development may proceed.

164. F. Pierce King's property is located right near the end of the airport runway, almost a mile south of the Project. The old tavern and his grandfather's farmland, which is where a few relics allegedly were found, are in the area near the intersection of US 7 and 103, also roughly one mile south of the site. None of the information provided by Mr. King relates to the Project site itself.

G. Criterion 9B (Primary Agricultural Soils)

165. The area surrounding the Project includes residences, light farming activities, a few commercial properties and one light industrial property.

166. The Project parcel is relatively open and is gently sloping to the east.

167. The soils found on the Project site include Paxton fine sandy loams on slopes of 2% to 8% (30B), Georgia & Amenia soils on slopes of 3% to 8% (66B), and a small area of Raynham silt loams on slopes of 0% to 4% (26A). The Paxton soils encompass approximately 7.3 acres while the Georgia & Amenia soils include some 3.1 acres. The Raynham soils are found in the extreme southeast corner of the subject tract and include only 0.1 acre.

168. The predominant Paxton soils are characterized as very deep and well drained. Permeability is moderate and the available water capacity is high. These soils are also moderate to strong in acidity.

169. The Georgia & Amenia soils share similar physical characteristics with the Paxton soils but are somewhat less acidic.

170. The Raynham soils also share similar features, however, these soils are poorly drained.

171. Slopes for the three soil classes on the Project site are significantly less than 15%.

172. Depth to bedrock is sufficient to allow for the cultivation of row crops.

173. Both the Paxton and the Georgia & Amenia soils have only slight limitations for agricultural uses from a physical standpoint. They typically are found on gentle slopes, are relatively well-drained, are deep soils and have acceptable chemical properties.

174. The Raynham soils, however, are very wet soils, which limits their utility to the production of hay.

175. All three soil classes or units, from a physical standpoint, meet the noted requirements for primary agricultural soils.

176. 2.5 acres of the Project tract do not qualify as primary agricultural soils because they are excessively wooded or have wetness limitations that are not easily overcome. No evidence was provided as to the soil classification within the 2.5 acres.

177. The Project's buildings and associated infrastructure will encompass virtually all of the 8 acres of primary agricultural soil.

178. Vermont agricultural activities include specialized crop production and small specialized farm operations such as herb farms, and flower and berry operations.

179. Andrew Chambers has cut hay on the Project tract. He has not paid to use the land, nor for the hay. If he had to pay to farm the property or for the hay, he would not do so.

180. The adjacent flower and vegetable gardening operation is part of the White farm. Machinery and farm building investment appears to be minimal.

181. Other operating farms in the Clarendon area are situated westerly of the Project tract and U.S. Route 7 within the bottomland areas of the Otter Creek.

Off-site Mitigation

182. The Applicant has proposed off-site mitigation as a way to achieve the criterion's objective of preserving agricultural lands. The applicant did not propose off-site mitigation during the Commission proceedings.

183. The applicant is willing to pay into a special fund that is maintained by the VDA for mitigation purposes. The conditions for mitigation prescribe that for every one acre of prime agricultural soil situated in a proposed project site, two acres of prime agricultural soil are to be saved or preserved within the general area of the project.

184. The Applicant proposed a compensation rate for mitigation purposes of $1,000 per acre.

185. Approximately eight acres of primary agricultural soils will be impacted by the Project. Assuming that, for every acre developed, an additional two acres will be preserved, then the eight acres developed will be offset by sixteen acres of preserved agricultural acreage.

Subcriteria

Subcriterion (i)

186. The valuation for the subject property as a commercial site, would fall in the range of approximately $10,000 to $12,500 per acre. The probable market value of the subject property would, therefore, fall in the range of approximately $100,000 to $130,000.

187. A reasonable market rate of return on the subject land considering its use as a commercial property and the reactions of investors for similar types of investment properties would be approximately 10.5% to 11% per annum.

188. The Applicant would need to earn between $10,500 to $14,300 each year for a reasonable return on his or her investment in the subject 10.5 acre parcel, before taxes and debt service.

189. The valuation of the subject property as an agricultural landholding, would fall in the range of approximately $1,500 to $1,800 per acre. Market value of the subject property, as an agricultural landholding, would fall in the range of approximately $15,000 to $19,000.

190. A recent in-depth study done for several regional Farm Credit Banks indicated that dairy farms in the northeast were returning approximately 14% on the equity position for the total farm investment.

191. Considering the noted yield rate, the capitalization rates for agricultural investments would be in the vicinity of 12%. Using this figure, the net farm income necessary to support the range of agricultural land values indicated above would be approximately $1,800 to almost $2,300 per year.

192. The subject property presently is assessed by the Town of Clarendon for $82,500 and pays about $1,600 per annum in taxes.

Subcriterion (ii)

193. The Russell Corporation was denied an Act 250 permit for the only other location it owns or controls where an asphalt plant could be located, the Route 133 quarry site.

H. Criterion 9K (Public or Quasi Public Investment)

194. The only public or quasi public investments associated with this project are highways US 7 and VT 7B.

195. Applicant has not proposed any upgrades or maintenance plans for either US 7 or VT 7B.

I. Criterion 10 (Conformance with the Town and Regional Plan)

TOWN PLAN

196. Clarendon has a duly adopted town plan. The Clarendon Town Plan ("Town Plan") was adopted in June 1995.

197. The Town Plan includes the following statements:

> [Action is required to] make a community a better place . . . [and it] requires vision and shared goals to insure that the actions that are taken are truly consistent with the type of community the people living in it hope to create.
> The scale of development within the Town will be consistent with the community's generally rural nature.
>
> Negative impacts on natural resources – including air, water, land, and wildlife in various form – will be minimized and, wherever possible, mitigated. Much of the community will remain distinctly rural.
>
> Goals and Objectives to Guide Future Growth . . . Preserve rural character by maintaining the historic settlement pattern of more densely settled villages and neighborhoods surrounded by undeveloped land.
>
> Support the protection of historic sites and landmarks. Regard the town's cultural resources and historic settlement pattern as significant, non-renewable resources that create a special sense of place and community well-being.

> Policies for Facilities and Services . . . Discourage land uses that would significantly diminish the value and availability of outdoor recreation activities.

198. The Town Plan has created seven (7) land use districts that are described in the narrative "Future Land Use" section: Conservation, Commercial, Residential-Commercial, Industrial, Village, Agricultural/Rural Residential, and Residential. The districts are also set forth in the Town Plan on a map captioned "Clarendon, Vermont – Future Land Use." The district names in the narrative are similar to, but not exactly like, the names in the map legend. Specifically, the "Recreation and Municipal Forest" district shown on the map is not mentioned in the descriptive material; the "Commercial Residential" district on the map is called the "Residential-Commercial" district in the narrative; and the "Agricultural Residential" district on the map is called the "Agricultural/Rural Residential" district in the narrative.

199. The Project would be located in the Industrial district as shown on the Future Land Use Map and as described at page 72 of the Town Plan. The land uses in the Industrial District are described as follows:

> The purpose of this district is to provide employment opportunities in manufacturing, warehousing and research and development. The district is to be served by good transportation facilities and so that surrounding district shall not be adversely affected, performance standards shall be established...

200. The "Industrial" district narrative ends with the sentence: "Other uses incompatible with industrial uses, such as residential, will be discouraged for the health, safety and welfare of the community."

201. The Town of Clarendon has three Industrial districts as indicated on the Future Land Use Map of the Town Plan. They are all located to the east of US 7, which travels through Clarendon in a north-south direction. The Project site is located to the east of US 7.

202. The Town Plan has no section devoted to scenic and aesthetic resources. The Town Plan has no scenic areas inventory and includes no policies specifically addressing aesthetics or scenic resources. The Town Plan includes no map of scenic areas.

203. The Clarendon zoning regulations were published in three sections: the 1976 regulations, the 1979 amendments, and the 1991 flood area regulations. The zoning regulations also include a map dated February 1979 showing land use districts. There are no other maps attached to the zoning regulations. The 1979 zoning amendments establish a Residential district as well as three development districts (Residential-Agricultural, Residential-Commercial, and Commercial-Industrial) and a flood hazard district. The Commercial-Industrial districts are located to the east of US 7 in approximately the same locations as the Industrial districts indicated on the Town Plan's Future Land Use Map. In addition, the zoning map indicates one small area as Commercial-Industrial to the west of US 7 in an area that the Town Plan identifies as a Commercial district.

204. The Project site lies in the Industrial district of the zoning map.

205. A town plan is intended to be an overall guide to community development.

206. The Clarendon Town Plan was adopted in 1995 and was in effect when the Project application was submitted.

207. The Clarendon Town Plan at page 3 cites the sections of the Vermont statutes that dictate what a plan must contain and how a plan must be adopted. There are ten required elements including, for example, a land use plan and a transportation plan. All ten of these elements are contained in the Clarendon Town Plan.

208. One statutory goal is, "To provide a strong and diverse economy that provides satisfying and rewarding job opportunities and that maintains high environmental standards..." 24 V.S.A § 4302 (b)(2). The designation of an industrial district will encourage the creation of jobs.

209. As for maintaining high environmental standards, two distinct items should be considered. First, the location of any industrial district should avoid environmentally sensitive areas such as wetlands and deer wintering areas. Second, the specific processes associated with an industrial plant or other job-producing business should meet standards for air and water quality, maximum noise levels, and any other relevant environmental standard.

210. A second statutory goals is, "To provide for safe, convenient, economic and energy efficient transportation systems that respect the integrity of the natural environment...." 24 V.S.A. §4302(c)(4).

211. The Transportation section of the Clarendon Town Plan begins by classifying all highways as arterial, collector or local. The major arterial highways in Clarendon are US 7 and Vermont Route 103. With US 7 designated as a limited access highway, the commercial and industrial districts in the Clarendon Town Plan are located along VT 7B and 103.

212. The Town Plan also recognizes the transportation infrastructure that is located within the town, including the airport and rail facilities. The Commercial and Industrial districts are located in proximity to these facilities to allow greater access to these modes of transportation.

213. The Future Land Use map attached to the Clarendon Town Plan, shows the project site being located near the middle of an "Industrial" district, in a corridor of industrial, commercial, and village planning districts along the US 7 corridor north of the airport.

214. The proposed asphalt plant is a manufacturing process, combining raw materials into a finished consumer product, it has fewer than five employees, and therefore, complies with the stated purpose of an Industrial District.

215. The language of the Town Plan calls for performance standards to protect surrounding districts, as opposed to lands within the district, but no performance standards have been adopted by the Town of Clarendon.

216. There are no other specific policies or goals in the Town Plan that would control the project site or the type of industry that may be located in the districts.

217. All three of Clarendon's industrial districts are located along VT 7B.

REGIONAL PLAN

218. The Regional Plan was adopted in 1994 and was in effect when the project application was submitted. A new Regional Plan was adopted in

late 1999, which currently is in effect. The 1999 Regional Plan is essentially a readoption of the 1994 plan.

219. A large map attached to the plan is labeled the "Key to Future Land Use Policies." According to the Future Land Use section of the regional plan at page 4-1:

The "Key to Future Land Use Policies Map" is a generalized land use map. It is based, generally, on current land uses within the region, particularly as it reflects the location of population centers. It is not intended to recommend or regulate actual uses in specific geographic areas, but instead to reflect potential land use patterns on a regional scale. This is for planning purposes only. Determination of appropriate uses for a specific site necessitates thorough review of the Regional Plan as well as local plans and bylaws.

220. This map depicts the center points of urban, town, and village centers, and hamlets against a backdrop of active use resource lands and sensitive resource areas. The center points seem to reflect population concentrations, not necessarily locally designated growth areas. The active resource areas appear to reflect Soil Conservation Service soil types and the sensitive resource areas appear to reflect mapped deer yards and class II wetlands. These are all very generalized in nature. For example, they show active use resource areas all through downtown Rutland even though all that farm and forest land has long been developed. The map is not suitable as a regulatory tool.

221. The section of the regional plan dealing with "Economic Activity," contains a clear policy on siting industrial development. On page 3-9, Goal 1 states:

Support and encourage economic activity in Rutland County through the retention or expansion of existing activity and the appropriate location of new economic activity. Immediately following this goal is Policy 1 which is intended to implement that goal. Policy 1 states:

Encourage the local designation of industrial sites adjacent to principal transportation corridors and infrastructure within the county.

This statement, combined with the lack of any industrial mapping on the regional map, indicates that the Regional Planning Commission intended the community plans to designate local industrial districts, not the regional plan.

222. The Regional Plan contains numerous goals and policies dealing with a variety of resource issues. None of them, however, require anything more restrictive than the criteria in Act 250. For example, Goal 1 in the Agricultural and Forest Resource section on page 3-79, calls for the protection of significant agricultural resources, and Policy 1 calls for the identification of regionally significant agricultural resources. These terms are not defined nor is any mapping provided. The definition and standards in Act 250 are more specific.

IV. CONCLUSIONS OF LAW

A. Jurisdiction, Scope of Review and Burden of Proof

The Project involves the construction of improvements for a commercial purpose on more than ten acres and thus constitutes "development" pursuant to EBR 2(A)(2). The Town of Clarendon has a duly adopted Town Plan and a zoning ordinance. The project is therefore subject to Act 250 jurisdiction. 10 V.S.A. § 6001(3).

When a party appeals from a Commission determination, the Board provides a "de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3). Board rules provide for the de novo review of a Commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, the Board cannot rely upon the facts stated, conclusions drawn, or conditions issued by the Commission regarding the criteria on appeal in this matter.

The burden of proof consists of both the burden of producing evidence and the burden of persuasion. *Re: Pratt's Propane*, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-6 (Jan. 27, 1987). The Applicant has the burden of production for all criteria. The burden of persuasion is as set out in 10 V.S.A.§ 6088.

B. Criterion 1 -- Air Pollution

Before issuing a permit, the Board must find that the proposed project will not result in undue air pollution. 10 V.S.A. § 6086(a)(1). The burden of proof for all aspects of Criterion 1 is on the applicant. *Id.* § 6088(a).

Nothing in Act 250 specifically defines "undue air pollution." Commission and Board decisions show that a wide range of potential substances and nuisances which may be considered air pollution. Air pollutants may include, among other things: dust, smoke, offensive odors, radiation, vibrations, and car and truck emissions. Industrial emissions such as paint fumes, fly ash, saw dust, and chemical vapors also qualify as air pollutants. Pollution that occurs both during construction and during the operation of a proposed project is subject to Act 250 review. *James E. Hand and John R. Hand d/b/a Hand Motors and East Dorset Partnership*, 8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 22 (August 19, 1996) (noise, fumes and dust constitute air pollution); *George and Marjorie Drown*, 7C0950-EB, Findings of Fact, Conclusions of Law, and Order at 14 (June 19, 1995) (dust), *L&S Associates*, 2W0434-8-EB, Findings of Fact, Conclusions of Law, and Order at 38-41 (June 2, 1993) (fumes from diesel trucks); *David and Joyce Gonyon*, 5W0125-EB, Findings of Fact, Conclusions of Law, and Order at 7 (April 5, 1991) (toxic paints and thinners).

Whether a pollutant is "undue" depends on factors such as the nature and amount of the pollution, the character of the surrounding area, whether the pollutant complies with certain standards or recommended levels, and whether effective measures will be taken to reduce the pollution. "Undue" has been defined in *Brattleboro Chalet Motor Lodge, Inc*., 4C0581-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Oct. 17, 1984) to mean "that which is more than necessary - exceeding what is appropriate or normal."

"Noise is considered air pollution where its occurrence may cause adverse health effects. The test for undue air pollution caused by noise is whether the noise has 'impacts rising above annoyance and aggravation to cause adverse health effects such as hearing damage.'" *Re: Bull's Eye Sporting Center*, #5W0743-2-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Feb. 27, 1997) *(quoting Talon Hill Gun Club and John Swinington*, #9A0192-2-EB, Findings of Fact, Conclusions of Law, and Order at 8 (June 7, 1995)); *see also Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB(Altered), Findings of Fact, Conclusions of Law, and Order at 18 (Jun. 12, 1997); *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 22 (Aug. 19,

1996)("The Board considers noise, fumes, and dust to be relevant under this criterion.").

Potential air pollution caused by the Project includes noise, vehicle emissions, dust and odors.

There is no evidence of adverse health effects caused by noise. Accordingly, the Board finds that the levels of noise generated by the Project will not result in undue air pollution.

The Board also finds that the emission levels from diesel engines from the Project will not result in undue air pollution. While the Board is aware of the rural setting of the proposed project site and is generally concerned about potential impacts from the large volume of proposed truck traffic, the vehicles used by the Project must comply with state and federal vehicle emission standards or recommended levels. Additionally, the Board does not believe that emission levels will be "that which is more than necessary - exceeding what is appropriate or normal."

The Board finds that the dust may potentially result in undue air pollution, however, with the conditions imposed pursuant to the Air Permit, dust emission will be mitigated, and will therefore, not result in undue air pollution. If the Board were to be issuing a permit in this matter, it would further condition the Project to require the covering of all trucks traveling to or from the project, including contractors.

Based on the foregoing findings of fact, the Board concludes that the Project will not result in undue air pollution.

C. Criterion 1(B) -- Waste Disposal

The Board will grant a permit whenever the applicant demonstrates "that, in addition to all other applicable criteria, the ... [Project] will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells." 10 V.S.A. § 6086(a)(1)(B).

The burden of proof is on the applicant under Criterion 1(B). *Id.* § 6088(a). Pursuant to Sections 3 and 4 of the Environmental Protection

regulations, a wastewater disposal system permit is not required unless there is a subdivision of lands or the construction of a public building. At this time, the Project does not include the subdivision of any lands, but the Project does include the construction of a public building on the site. The Vermont Department of Environmental Conservation issued Applicant a Water Supply and Wastewater Disposal Permit.

Wastewater at the Project will be collected in a vault privy which will be periodically pumped and the sewage hauled off-site for disposal. Stormwater runoff will not be increased by the development of the Project. The Project design incorporates a sedimentation pond with a wet basin. This system captures any trace contaminants. Grassed swales will also capture trace contaminants from the roadways. A Stormwater Discharge Permit is not required for the Project. The Project's storage tanks have tertiary containment systems and the Applicant has prepared and submitted a Spill Prevention Control and Countermeasure Plan.

The nearest well is more than 500 feet away from the Project. The soils at the site prevent surface water from entering the aquifer. The proposed berm will not impound water.

Under 10 V.S.A. § 6086(d), the Board is authorized to issue rules providing for presumptions of compliance for permits issued by other state agencies. Pursuant to EBR 19(B), a Waste Water Permit "when entered into the record pursuant to Rule 17(B), will create presumptions of compliance with the applicable criteria of the Act in the manner set out in section (F) of this rule." Pursuant to EBR 19(E)(1), the Waste Water Permit creates a rebuttable presumption that waste materials and wastewater can be disposed of through installation of wastewater and waste collection, treatment and disposal systems without resulting in undue water pollution.

EBR 19(F) specifies the manner in which a presumption may be rebutted. It provides that:

> If a party challenges the presumption, it shall state the reasons therefore and offer evidence at a hearing to support its challenge. If the commission or board concludes, following the completion of its own inquiry or the presentation of the challenging party's witnesses and exhibits, that a preponderance of the evidence shows that undue water pollution...is likely to result, then the commission or board shall rule that

> the presumption has been rebutted. Technical non-compliance with the applicable health, water resources and Agency of Natural Resources' rules shall be insufficient to rebut the presumption without a showing that the non-compliance will result in, or substantially increases the risk of, undue water pollution....

EBR 19(F).

Accordingly, the Cross Appellants must rebut the presumption of compliance created by the Waste Water Permit in one of two ways: (1) through a showing, by a preponderance of the evidence, that the Project is likely to result in undue water pollution; or (2) a demonstration that the Project does not comply with the Environmental Protection Rules coupled with a showing that such non-compliance will result in, or substantially increase the risk of, undue water pollution. *Re: Herbert and Patricia Clark*, #1R0785-EB, Findings of Fact, Conclusions of Law and Order (Apr. 3, 1997).

The Applicant introduced into evidence its Wastewater and Water Supply Permit issued by the ANR. The Neighbors have not produced any evidence that the Project is likely to result in undue water pollution nor have they demonstrated that the Project does not comply with the Environmental Protection Rules coupled with a showing that such non-compliance will result in, or substantially increase the risk of, undue water pollution.

The Board finds that by a preponderance of the evidence the Applicant has maintained its presumption of compliance that the Project will not result in undue water pollution. Further, the Applicant has provided ample evidence that any potential contaminants will not leave the Project site and will not endanger any wells in the area. While the use of potassium chloride could raise concerns about contaminated surface water, the Applicant agreed to a condition that only sand will be used to combat slippery roadways.

Based upon the foregoing findings of fact, the Board concludes that the project meets all applicable health and environmental conservation department regulations and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells.

D. Criterion 3 -- Burden on Existing Water Supply

Before issuing a permit, the Board must find that the Project "[w]ill not cause an unreasonable burden on an existing water supply, if one is to be utilized." 10 V.S.A. § 6086(a)(3). Criterion 3 addresses the "impacts on the ability to meet the demand of neighboring wells or water sources if those other wells or water sources share the same basic source of water such as an aquifer or common spring." *Re: MBL Associates*, #4C0948-EB Findings of Fact, Conclusions of Law, and Order (Altered) at 28 (May 2, 1995). The burden of proof is on the applicant under Criterion 3. *Id.* § 6088(a).

The Project's potable water will be provided to the Project as bottled water. Non-potable water will be provided by an on-site drilled well. The Project itself does not have a large volume water demand as no gravel washing nor truck washing is proposed. The nearest well to the Project is more than 500 feet upgradient from the Project site.

Based upon the above findings of fact, the Board concludes that the operations of the Project will not adversely impact the groundwater yield or the groundwater quality in individual potable water supplies located within the vicinity of the Project. Accordingly, the Board concludes that the Project operations will not cause an unreasonable burden on any existing water supplies.

E. Criterion 5 -- Traffic Congestion and Safety

Before issuing a permit, the Board must find that the proposed Project, "[w]ill not cause unreasonable congestion or unsafe conditions with respect to the use of highways . . . ." 10 V.S.A. § 6086(a)(5) (traffic). A permit may not be denied solely on the basis of Criterion 5, but the Board may attach reasonable conditions and requirements to the permit to alleviate the burden created. *Id.* § 6087(b). The burden of proof is on the opponent under Criterion 5, *id.* § 6088(b), but the applicant must provide sufficient information for the Board to make affirmative findings.

Applicant agreed that all truck traffic would drive north out of the Project driveway on 7B. The Board finds that the truck route and the maximum daily cap on truck traffic (326 one-way trips) at the driveway entrance off Route 7B will not result in unreasonable congestion. With regard to the issue of safety, the Board is persuaded that Project transport trucks and other large truck traffic associated with Project operations will not result in unsafe conditions.

Based on the findings of fact, the Board concludes that this Project will not cause unreasonable congestion or unsafe conditions with respect to the use of highways.

F. Criterion 8 -- Aesthetics

Before issuing a permit, the Board must find that the Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas. 10 V.S.A. § 6086(a)(8) (aesthetics). The burden of proof is on the opponents under Criterion 8, *id.* § 6088(b), but the applicant must provide sufficient information to the Board to make affirmative findings. *See, e.g., Re: Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 19 (June 12, 1997) and cases cited therein.

Criterion 8, "was not intended to prevent all change to the landscape of Vermont or to guarantee that the view a person sees from her property will remain the same forever." *Re: Okemo Mountain, Inc.*, #2S0351-8-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Dec. 18, 1986). Criterion 8 was intended to ensure that as development occurs, reasonable consideration will be given to the visual impacts on neighboring landowners, the local community, and on the special scenic resources of Vermont. *Horizon Development Corp.*, #4C0841-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 21, 1992). Nevertheless, projects that result in the loss of open space and the alteration of vistas can have an adverse effect on aesthetics and scenic beauty. *See e.g., Re: Thomas W. Bryant and John P. Skinner*, #4C0795-EB, Findings of Fact, Conclusions of Law, and Order at 21 (June 26, 1991); *see also Re: Maple Tree Place Associates*, #4C0775-EB, Findings of Fact, Conclusions of Law, and Order at 48-49 (June 25, 1998); *Re: George, Mary, and Rene Boissoneault*, #6F0499-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Jan. 29, 1998).

Aesthetics, Scenic and Natural Beauty

The Board uses a two-part test to determine whether a project satisfies Criterion 8 (aesthetics). First, it must determine whether the project will have an adverse effect under Criterion 8. *Id.*; *see also Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996); *Re: Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, Findings of

Fact, Conclusions of Law, and Order (Nov. 4, 1985). Second, it determines whether the adverse effect, if any, is undue. *Hand, supra*, at 24; *Quechee Lakes, supra*, at 17-20.

1. Adverse Effect

In determining whether a project will have an adverse effect,

> [T]he Board looks to whether the proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space.

Hand, supra at 25. In other words, if a project "fits" its context, it will not have an adverse effect. *Re: Talon Hill Gun Club and John Swinington*, #9A0192-2-EB, Findings of Fact, Conclusions of Law, and Order at 9 (June 7, 1995).

The area surrounding the Project includes open fields, wooded lowlands, intermediate hills. Additional land uses in the area include agricultural farming, including barns and farmhouses, residences and a few commercial properties. There are no industries in the area The Project site is a meadow or former farm field. The area is somewhat wooded with deciduous and coniferous trees with openings of various sizes for residences and farming purposes. The area also serves as a recreational resource for biking, jogging and walking. Wildlife is in the area. While views of the Project may be limited, there are areas surrounding the Project site from which the Project can be viewed.

The Project represents a significant departure from those land uses existing in the area and it may be visible to some residents and the traveling public. The area of the Project will experience an increase in noise and traffic. Accordingly, the Board finds that the sitting of an asphalt plant in an existing residential/agricultural area would not "fit." The Board concludes that the Project will not be in harmony with its surroundings and that the Project will create an adverse aesthetic impact.

2. Undue

If the Board concludes that the proposed Project will have an adverse effect under Criterion 8, the Board must evaluate whether the adverse effect is "undue." *Hand*, *supra* at 25. The Board will conclude that the adverse effect is undue if it reaches a positive finding with respect to any one of the following factors:

a. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

b. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

c. Has the applicant failed to take generally available mitigation steps which a reasonable person would take to improve the harmony of the project with its surroundings?

See, e.g., Black River, supra, at 19-20, *Hand, supra*, at 25-29; *Quechee Lakes, supra*, at 19-20.

The Board considers these three factors out of order starting first with the written community standard, then focusing on mitigation, and ending with an analysis of whether the project is offensive or shocking.

a. Written Community Aesthetic Standard

With respect to the first factor, the Board concludes that there are no clear, written community standards intended to preserve the aesthetics or scenic beauty of the area. The Town Plan includes several statements regarding the desire to protect the town's rural character and protect historic sites and recreational opportunities. These statements are broad and general in nature. They neither address specific aesthetic resources nor identify the area surrounding the proposed Project as a location of particular concern. Although the Town Plan clearly evinces a general desire to preserve the rural character of the town as a whole, the Plan does not contain a clear, written community

standard regarding aesthetics and scenic beauty applicable to the area in which the Project would be located. *Compare* the instant proceeding *with Re: Herbert and Patricia Clark*, #1R0785-EB, Findings of Fact, Conclusions of Law, and Order at 35-37 (Apr. 3, 1997) (Brandon Town Plan constituted clear, written community standard where it established and defined three categories of scenic resources, contained an inventory that described 30 scenic areas, and provided recommended policies and implementation measures for protecting the scenic value and resources of the listed areas and where the proposed project was located in one of the scenic areas listed in the inventory) *and Re: The Mirkwood Group and Barry Randall*, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 22-23 (Aug. 19, 1996) (Pittsford zoning ordinance constituted clear, written community standard where proposed radio tower was located within conservation district and the ordinance contained a clear statement of the community policy against use of conservation district lands for anything other than dwellings, forestry, and agriculture).

No other evidence of a clear, written community standard was proffered. The record is devoid of a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area in which the proposed Project is located. Therefore, the Board concludes that no such standard would be violated by the Project.

b. Generally Available Mitigating Steps

Applicant proposes to locate the Asphalt Plant at a low elevation on the site away from the road. The Project would not be situated in a visually sensitive area, such as a ridgeline, steep slope, shoreline, or floodplain. The Project is designed as a Titan 3000 plant with a shorter stack in lieu of a Cedar Rapids model. Some intervening woods, although primarily deciduous, forms a barrier between VT 7B and the Project site. Views of the Project would be further minimized by the proposed berms, staggered rows of conifers, and earth-toned building colors. Noise from the Project would be controlled by the loop design of the driveways, "radar" back-up alarms on trucks and equipment, and baffles enclosing equipment. Additionally, access roads and the truck route through the plant will be paved to reduce dust. Night lighting includes timers to reduce lighting levels. Truck traffic is restricted to VT 7B north only and will be limited during peak hours. Applicant has agreed to limit annual plant production to 150,000 tons of asphalt concrete to be phased in over the first three years of Project operations.

Based upon these measures taken by the Applicant, the Board finds that the Project incorporates the generally available mitigating steps thereby improving the Project's harmony with its surroundings.

c. Offensive or Shocking

In deciding if a project is offensive and shocking, the Board views the Project as an average person would. The Board concludes that the Project will offend the sensibilities of the average person, and that the Project is offensive or shocking because it is out of character with its surroundings as they exist today. During the site visit the Board observed the area to be relatively quiet, pastoral, and scenic. Albert Trombley testified of his concern about odor negatively impacting his enjoyment of his property, specifically when he cares for and rides his horses. The Board does not believe that any such potential impacts will be undue. The nearest commercial use is a Pepsi distribution facility on the west side of VT 7B. The Pepsi facility is a low profile light industrial or commercial use with low aesthetic impacts. Even though the Project is designed with berms and trees to mitigate aesthetic impacts, the Board is not persuaded that the mitigation will effectively reduce the offensiveness of the adverse aesthetic impacts. The scale and height of structures as viewed would be shocking.[6] The Board does not believe that the proposed mitigation will effectively reduce noise and other aesthetic impacts caused by plant operations and the additional 326 truck trips associated with the Project. The Board, therefore, finds that the increased level of truck traffic from 11 trips to 337 trips (an increase of almost 3,000%) along with the scale and magnitude of plant operations and the associated impact and intrusion on the lives of those in the area will be offensive. The Project is out of character being heavy industry in an agricultural, residential and light industrial area.

Based on the above, the Board concludes that the Project will have an undue adverse effect on the scenic or natural beauty or aesthetics of the area.

Historic Sites

---

6 Applicant provided testimony of an eight foot high chain link fence surrounding the Project, although the Project site plans and exhibits do not depict this fence. If such a fence is part of the Project, its presence would add to the shocking aesthetic impact of the Project.

The Board uses a three-part test to determine whether a Project satisfies Criterion 8 (historic sites). First, it must determine whether the Project is or contains an historic site. Second, it determines whether the proposed Project will have an adverse effect on the historic site. Third, it determines whether the adverse effect, if any, is undue. *Re: Manchester Commons Associates*, #8B0500-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Sept. 29, 1995).

"Historic site" is defined as "any site, structure, district or archeological landmark which has been officially included in the National Register of Historic Places and/or the state register of historic places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant." 10 V.S.A. § 6001(9). Listing on the national and state registers is a question of fact. *Manchester Commons, supra*, at 19.

Even if the site has not been listed on the national or state register, 10 V.S.A. § 6001(9) allows the Board or district commissions to declare it to be an "historic site" if there is persuasive evidence of historic significance brought before the Board or district commissions by the testimony of the Vermont Advisory Council of Historic Preservation. Therefore, under this part of the "historic site" definition, the Board or district commissions must examine the testimony of the Advisory Council to determine whether such testimony establishes a site, structure, district, or archeological landmark as historically significant. *Id*. The Board and district commissions are not bound by the opinion provided by the Council. *Id.* at 20. Instead, as with any witness, the Board and district commissions may believe all of the Council's testimony, none of it, or some of it. *Id.*

The site has been determined by the DHP to be archaeologically sensitive insofar as it may contain relics from pre-historic Native Americans. The applicant has offered to conduct an archaeological survey prior to constructing the plant. VT 7B, also referred to as the "Ethan Allen Highway" may have been the old "Crown Point Military Road" circa 1759-1760, an important roadway during the French and Indian War and the Revolutionary War.

If a permit were to be issued, the Board would condition the permit to require, among other precautions, that the Applicant conduct a Phase I archeological site survey prior to any construction.

Rare and Irreplaceable Natural Areas

The Board uses a four-part test to determine whether a Project satisfies Criterion 8 (rare and irreplaceable natural areas). First, it must determine whether the Project is located in a natural area. Second, it determines whether the natural area is rare and irreplaceable. Third, it determines whether the Project will have an adverse effect on the rare and irreplaceable natural area. Fourth, it determines whether the adverse effect, if any, is undue. *Re: Leo and Theresa Gauthier*, #4C0842-EB, Findings of Fact, Conclusions of Law, and Order at 11-13 (June 26, 1991).

There are two guidelines for identifying natural areas:

a. an area which contains an identifiable type of ecological community; and

b. an area in which natural conditions predominate over human influences.

Id. at 11. There are 24 officially designated "natural areas" in Vermont, but the Board has specifically ruled that a site does not have to be officially listed to be considered a natural area. *Id.* at 9.

No party produced evidence that the Project area contains any natural areas whether or not they are rare and irreplaceable. The Board therefore finds that there are no natural areas to analyze under Criterion 8.

In summation, the Board concludes that the Project fails to conform to 10 V.S.A. § 6086 (a)(8)(aesthetics).

G. Criterion 9(B) -- (Primary Agricultural Soils)

Before issuing a permit for the development or subdivision of primary agricultural soils, the Board must find that the project “will not significantly reduce the agricultural potential of the primary agricultural soils,” or that

(i) the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential; and

> (ii) there are no nonagricultural or secondary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose; and
>
> (iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage; and
>
> (iv) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential.

10 V.S.A. § 6086(a)(9)(B).

"Primary agricultural soils" are defined as:

> Soils which have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or highly responsive to the use of fertilizer, and have few limitations for cultivation or limitations which may be easily overcome. In order to qualify as primary agricultural soils, the average slope of the land containing such soils does not exceed 15 percent, and such land is of a size capable of supporting or contributing to an economic agricultural operation. If a tract of land includes other than primary agricultural soils, only the primary agricultural soils shall be affected by criteria relating specifically to such soils.

10 V.S.A. §6001(15).

The burden of proof under Criterion 9(B) is on the Applicant. 10 V.S.A. §6088(a).

1. The existence of primary agricultural soils at the Project Site.

In evaluating a project for conformance with Criterion 9(B), the Board must first determine whether the site contains primary agricultural soils.

The soils found on the Project site include Paxton fine sandy loams on slopes of 2% to 8%, Georgia & Amenia soils on slopes of 3% to 8%, and a small area of Raynham silt loams on slopes of 0% to 4%. The Paxton soils encompass approximately 7.3 acres while the Georgia & Amenia soils include some 3.1 acres. The Raynham soils are found in the extreme southeast corner of the subject tract and include only 0.1 acre. The predominant Paxton soils are characterized as very deep and well drained. Permeability is moderate and the available water capacity is high. These soils are also moderate to strong in acidity. The Georgia & Amenia soils share similar physical characteristics with the Paxton soils but are somewhat less acidic. The Raynham soils also share similar features, however, these soils are poorly drained. Slopes for the three soil classes on the Project site are significantly less than15%. Depth to bedrock is sufficient to allow for the cultivation of row crops. Both the Paxton and the Georgia & Amenia soils have only slight limitations for agricultural uses from a physical standpoint. They typically are found on gentle slopes, are relatively well-drained, are deep soils and have acceptable chemical properties. The Raynham soils, however, are very wet soils, which limits their utility to the production of hay.

While all three soil classes or units qualify as primary agricultural soils, approximately 8 of the 10.5 acres of the Project tract contain “primary agricultural soils” as defined by 10 V.S.A. § 6001(15). According to the testimony of the VDA, the remaining 2.5 acres are not primary agricultural soils because they are excessively wooded or have wetness limitations that are not easily overcome. The White farm is immediately adjacent to the Project tract and several active farms are in close proximity. Accordingly, the Project tract is capable of contributing to an economic agricultural operation.

2. Reduction in agricultural potential of primary agricultural soils.

Once the Board has determined that the site contains primary agricultural soils, it must determine whether the Project would significantly reduce the

agricultural potential of the soils. "The Board interprets the word 'potential' to require a consideration of whether the design and location of the subdivision on the property will preclude agricultural use of the primary agricultural soils and not whether agricultural use of those soils is likely in light of current economics and surrounding land uses." *Re: Raymond Duff,* #5W0921-2R-EB (Revised), Findings of Fact, Conclusions of Law & Order at 13 (June 14, 1991), *citing George, Mary and Rene Boissoneault, supra*, at 22, *citing Re: Raymond Duff*, #5W0921-2R-EB(Revised), Findings of Fact, Conclusions of Law, and Order at 13 (June 14, 1991) (modifying *Re: J. Philip Gerbode*, #6F0357R-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Mar. 26, 1991). #4C0614-3-EB, Findings of Fact, Conclusions of Law, and Order at 7 (May 18, 1988).

The Project tract is approximately 10.5 acres, and as discussed above, 2.5 acres of these 10.5 acres are not primary agricultural soils. The site plan for the Project shows that the construction of the Project's buildings and associated infrastructure will significantly reduce the soils' agricultural potential. Virtually all of the 8 acres of primary agricultural soils will be impacted. Thus, the Project would directly impact and remove from agricultural potential the 8 acres of primary agricultural soils on the site.

The Board concludes that the loss of virtually all of the primary agricultural soils on a site constitutes a reduction in the agricultural potential of such soils.

3. The Off-site Mitigation Program.

Applicant seeks to satisfy Criterion 9(B) through a proposed Mitigation Agreement under which Applicant would contribute $16,000 into a fund to protect two acres of primary agricultural soils for every acre of primary agricultural soils which would be lost to the Project . As noted in the Findings of Fact, the $16,000 figure was derived by multiplying the 8 acres of primary agricultural soils that would suffer potential reduction as a result of the Project by two and multiplying that result by a "price per acre" factor of $1,000. Within the last few years, beginning with the Board decision in *Re: J. Philip Gerbode*, #6F0357R-EB, Findings of Fact, Conclusions of Law, and Order (Mar. 26, 1991), the Board and some district commissions have allowed applicants in particular cases to use mitigation agreements to fully compensate for the negative effects under Criterion 9(B) of their projects and thereby satisfy the Criterion.

a. The validity of the Off-site Mitigation Program.

The Board has found the off-site mitigation program to be valid. *Southwestern Vermont Health Care Corporation*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 40 (Feb. 22, 2001).

The Board recognizes that there are instances in which an applicant will realize in the initial stages of design that its project will significantly reduce the potential of primary agricultural soils at its site and that it cannot meet all of the four subcriteria. Such an applicant will therefore seek to satisfy Criterion 9(B) by entering into a Mitigation Agreement as an alternative to meeting the subcriteria. In the past, once a Mitigation Agreement had been signed by VDA and an applicant, the Board has generally accepted the Agreement without further inquiry.

In *Southwestern Vermont Health Care Corporation*, *supra*, the Board stated that it now intends to more closely evaluate the validity of Mitigation Agreements on an individual basis. That decision set forth the following rationale for and requirements of Mitigation Agreements:

> There can be little debate that the Legislature considers the protection of primary agricultural soils in Vermont to be a matter of great importance. Not only has the Legislature established the mandates of Criterion 9(B), it has stated that "Preservation of the agricultural and forestry productivity of the land, and the economic viability of agricultural units … are matters of the public good. Uses which threaten or significantly inhibit these resources should be permitted only when the public interest is clearly benefitted thereby." Act No. 85, §7(a)(2) (1973), *see* 10 V.S.A. §6042, *History.* These provisions constitute a clear signal to the Board that it must tread very carefully when approving any procedure – including Mitigation Agreements – which can have the effect of reducing the potential of Vermont's primary agricultural soils.
>
> Thus, *Mitigation Agreements should be used only as a last resort - - only when an applicant has seriously attempted, but failed, to meet the subcriteria.* The Board understands that there will be circumstances in which, even with the best of efforts, a project will fail the subcriteria. But if efforts to reduce the impacts of a project are not even attempted, then Mitigation Agreements will be seen as no more than a cost of

> doing business. Therefore, the Board now requires that, before a Mitigation Agreement will be accepted by the Board, an applicant must also design its project to meet the subcriteria (ii) and (iii) of Criterion 9(B) to the extent reasonably feasible. *Southwestern Vermont Health Care Corporation*, *supra* at 46. Thus, for example, if an applicant owns or controls other lands which would be suitable for the development or subdivision but chooses not to use those lands, *see* 10 V.S.A. §6086(a)(9)(B)(ii), or if the development or subdivision could be planned to minimize the reduction of the potential of the primary agricultural soils, but the applicant chooses to not implement such a plan, *see* 10 V.S.A. §6086(a)(9)(B)(iii), the Board will not accept a Mitigation Agreement in lieu of meeting the subcriteria.
>
> Further, DAG will not enter into mitigation agreements unless DAG can find that the project meets subcriterion (iv) of Criterion 9(B). The Board believes that this requirement imposed by DAG is reasonable, and therefore, incorporates it as its own. Thus, before the Board will consider accepting any Mitigation Agreement entered into between an applicant and DAG, the applicant's project must meet subcriterion (iv).
>
> Finally, the Board must have assurances that funds donated under a Mitigation Agreement will be of an amount sufficient to ensure that at least two acres of farmland will be purchased or otherwise protected for every acre of primary agricultural soils that will be lost to development. This 2:1 ratio has been historically applied under the Mitigation Program, and it is one which the Board believes must, at the very least, be maintained.

Southwestern Vermont Health Care Corporation, *supra* at 44.

b. The applicability of the Mitigation Program to this case.

The Board is concerned with the proposed mitigation in the instant case.

First, off-site mitigation was not proposed by the Applicant in the

proceedings before the Commission. In fact, the Commission's Decision states: "The applicant proposes no offsite mitigation." When a party appeals from a Commission determination, the Board provides a "de novo hearing on all findings requested by any party that files an appeal or cross-appeal, according to the rules of the [B]oard." 10 V.S.A. § 6089(a)(3). Board rules provide for the de novo review of a Commission's findings of fact, conclusions of law, and permit conditions. EBR 40(A). Thus, when an applicant modifies a Project at the time it appeals the decision rendered by the Commission, it is appropriate to remand the revised project back to the Commission for initial consideration of the revised project rather than the Board considering the revised project for the first time.

Second, the Board believes that the mitigation proposed in this case is too vague and uncertain to be accepted. See *Southwestern Vermont Health Care Corporation*, *Supra* at 47. Apparently, no mitigation agreement has been entered into by the Applicant and VDA. The Applicant merely offers to accept, as a condition of a land use permit, the requirement that a mitigation agreement be entered into with VDA.

Since the purpose of the Mitigation Program is to mitigate the loss of primary agricultural soils at a particular project site, the Board needs assurance that such loss will be adequately compensated. The mere proposal to mitigate does not provide such assurances; it does not guarantee that the funds proposed will be sufficient to protect at least two acres of farmland for every acre of primary agricultural soils that would be lost to the Project.

An acceptable Mitigation Agreement will include the Applicants, VDA and VHCB attempting to identify those lands that will be protected by a particular contribution to the Mitigation Fund. If this is not possible at the time the Mitigation Agreement is signed, VDA and VHCB should develop an appropriate mechanism for insuring that twice the number of acres of lands with an agricultural potential comparable to those destroyed by the project will be protected in perpetuity, so that the Board and the District Commissions can know that the Mitigation Program is serving its purpose. Without such identification of lands to be protected or some other means to convince the Board that the purpose of the Program is being met, the Board will continue to be concerned that Mitigation Agreements may not satisfactorily address the language and purpose of Criterion 9(B) or (C). See *Southwestern Vermont Health Care Corporation*, *Supra* at 45.

4. Subcriteria of Criterion 9(B)

If, as here, the Board concludes that the Project as proposed, significantly reduces the agricultural potential of the primary agricultural soils, and if, as here, the Board decides that it cannot accept a Mitigation Agreement, the Board can reach an affirmative conclusion as to Criterion 9(B) only if Applicant meets its burden as to each of the four subcriteria of 9(B).

a. Subcriterion (i)

Under subcriteria (i), an applicant must demonstrate that he "can realize a reasonable return on the fair market value of his land *only* by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential." 10 V.S.A. §6086(a)(9)(B)(i) (emphasis added). As the Board wrote in *Re: Thomas W. Bryant and John P. Skinner*, *supra*, at 26 and 28-29:

> [Subcriterion 9(B)(i)] requires that the Applicants demonstrate that they can realize a reasonable rate of return *only* by devoting the property to uses which will reduce the soils' potential. This criterion requires the computation of a fair market value for the property and the consideration of alternative land uses which will not significantly reduce the agricultural potential of the primary agricultural soils found on-site, including different designs for a residential or commercial project that use less of the primary agricultural soils. The rates of return from these alternative uses must then be related to the fair market value of the property. Evidence must also be provided concerning what is a reasonable rate of return for each specific proposal.

(Emphasis in original). *And see Re: Nile and Julie Duppstadt and John and Deborah Alden, supra; Homer and Marie Dubois,* #4C0614-3-EB, Findings of Fact, Conclusions of Law, and Order at 7 (May 5, 1988) (subcriterion (i) was not satisfied because the applicant could not demonstrate that there are no other economically feasible land uses which will not significantly reduce the agricultural potential of the soils)

In discussing subcriterion (i), the Board has also written:

> That provision does not ask for a comparison of monetary return if the site is used solely for agricultural purposes versus use for development as proposed in the application.
>
> Rather, the Applicants must demonstrate that there is *no land use through which they can secure a reasonable rate of return on their investment which does not significantly reduce agricultural potential.* For example, if a reasonable return could be secured by locating four single-family houses on two of the 10.3 acres, allowing the retention of the residual in agricultural production, then subcriterion (i) cannot be satisfied. It is the Applicants' burden to demonstrate that other agricultural and non-agricultural uses of the site which do not diminish the soil's potential will not afford the Applicants a reasonable return.

Re: Marvin T. Gurman, #3W0424-EB, Findings of Fact, Conclusions of Law, and Order at 19 (June 10, 1985) (emphasis added).

The Board has also made it clear that it does not compare rate of return from development against such return from agricultural use in determining this subcriterion:

> Finally, we expressly reject the assertion made by all parties in this appeal that because the land is potentially and immediately more valuable in nonagricultural development than it is in agricultural use, its conversion to a subdivision is sanctioned by the subcriterion. The subcriterion is satisfied only when the applicant is unable to realize a reasonable return on the fair market value of his land in agricultural use. We are not asked to determine what its relative value might be upon conversion if this development plan were to succeed.

Re: Richard and Napoleon LaBrecque, #6G0217-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Nov. 17, 1980) (where fair market value

was determined to be $2000/acre, but owner could only realize annual return in agriculture of $50/acre, applicant met subcriterion (i)).

Thus, a "reasonable rate of return" does not mean the highest rate of return possible for a particular parcel, but only that a reasonable return on the fair market value of the property is obtainable through agricultural or other uses that will not result in the significant reduction of the primary agricultural soils at the project site. Applicant proposes that this subcriterion should be evaluated on the "highest and best use" of the parcel. The Board rejects Applicant's analysis.

The first step to an analysis of subcriterion (i) is to establish the fair market price for the land in question. *Re: Thomas W. Bryant and John P. Skinner*, supra.

Applicant provides an analysis of fair market value for the subject tract and considers values both as a commercial site and as an agricultural site. As a commercial site, Applicant assigns a valuation of $10,000 to $12,500 per acre. This equates to a market value of the subject tract of approximately $100,000 to $130,000. As an agricultural site, Applicant assigns a valuation of $1,500 to $1,800 per acre. This equates to a market value of the subject tract of approximately $15,000 to $19,000.

As stated above, the Board does not compare rate of return from development against such return from agricultural use in analyzing this subcriterion. *Re: Richard and Napoleon LaBrecque*, *supra* at 6. In other appeals before the Board, the Board has calculated a property's fair market value by adjusting a town's appraisal by the State-determined equalized fair market value ratio of 96%. See *Southwestern Vermont Health Care Corporation*, *supra* at 48. In this case, that calculation would equate to $85,800, established by adjusting the Town's appraisal of the land ($82,500) by the State-determined equalized fair market ratio of 96%.

The Board concludes that the fair market value in this case is $100,000. This is a value between Applicant's high end calculation of $130,000 and the adjusted Town appraisal of $85,000.

The second step in the analysis of subcriterion (i) is to calculate the rate of return that could be reasonably anticipated by the Applicant in order to determine whether the proposed project is the *only* one which can provide the

Applicant with a fair rate of return on the fair market value of the property. *Re: Thomas W. Bryant and John P. Skinner*, *supra.*

Using the property's fair market value of $100,000, if the property had an annual return of 12% (the amount proposed by Applicant), the property would produce $ 12,000 per year, less the carrying costs (i.e. real estate taxes of $1,600), resulting in an annual return of $10,400.[7]

The Board concludes that there may be uses, other than the proposed Project, which could provide a reasonable rate of return to the Applicant. The Applicant, however, failed to meet its burden of proof relating to this subcriterion.

Although the Applicant looked at farming uses that might provide a reasonable rate of return on the land, the Applicant considered only the production of corn silage farming in concluding that no agricultural use would realize an adequate return.

Applicant did not consider raising alternative crops on the land. Currently, adjacent lands are used to grow gladioli, perennials and a variety of vegetables.

Since alternative crops can yield a substantial return per acre, it is possible that the land's productive value could well be realized by renting all (or even only part) of the primary agricultural soils to farmers who raise alternative crops, thereby providing Applicant with an adequate return on his investment, even when such return is calculated using the questionable 12% figure.

Additionally, the Applicant did not consider other non-farming uses for the land that might have less impact on the primary agricultural soils on the Project site but that would still provide a reasonable rate of return on the fair market value of the Project site.

---

[7] Applicant used the property's commercial use fair market value of $100,000 to $130,000, where if the property had an annual return of 11%, the property would produce $ 11,000 to $14,300 per year, exclusive of the carrying costs (i.e. real estate taxes). Applicant also used the property's agricultural use fair market value of $15,000 to $19,000, where if the property had an annual return of 12%, the property would produce $ 1,800 to $ 2,300 per year, exclusive of the carrying costs.

Furthermore, the Applicant did not consider other economically feasible use or development options, but rather summarily rejected alternate uses because of zoning and the lot's size and configuration. Thus, Board believes that Applicant approached subcriterion (i) from the wrong direction. Rather than attempting to determine whether there were alternative uses for the Project site that would not have an impact on the land's agricultural potential, Applicant presented only evidence that supported its belief that its Project could be the only use for the land. By using this approach, the Applicant failed to meet its burden to show that the Project satisfies subcriterion (i).

b. Subcriterion (ii)

Under this subcriterion, Applicant must demonstrate that there are no nonagricultural or secondary agricultural soils owned or controlled by it reasonably suited to the Project.

While Applicant owns another property off of Route 133, Applicant has already been denied an Act 250 land use permit for the Project in that location. The Applicant does not own any other sizable parcels upon which to site this Project.

The Board concludes that Applicant has satisfied this subcriterion.

c. Subcriterion (iii)

Subcriterion 9(B)(iii) is not before the Board in this appeal.

d. Subcriterion (iv)

Subcriterion 9(B)(iv) requires the Board to determine whether the Project will not significantly interfere with or jeopardize the continuation of agricultural operations on the adjoining lands.

As the Board has already concluded that the Project fails to satisfy subcriterion i and that the mitigation proposed in this case is too vague and uncertain to be accepted, the Board declines to consider this subcriterion.

e. conclusion as to the subcriteria of Criterion 9(B)

The Board concludes that, while the Project is in compliance with subcriteria (ii) of Criterion 9(B), it does not satisfy subcriteria (i). Again, the mitigation proposed in this case is too vague and uncertain to be accepted. Mitigation was not offered before the Commission and no mitigation agreement has been entered into by the Applicant and VDA. The Applicant merely offers to accept, as a condition of a land use permit, the requirement that a mitigation agreement be entered into with VDA. Therefore, the Project does not conform with Criterion 9(B).

H. Criterion 9(K) -- Public Investments and Services

Criterion 9(K) provides that:

> [a] permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

10 V.S.A. § 6086(a)(9)(K).

The Board conducts two separate inquiries under Criterion 9(K) with respect to governmental and public facilities. First, the Board examines whether the proposed Project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Board examines whether a proposed Project will materially jeopardize or interfere with (a) the function, efficiency, or safety of such facilities, or (b) the public's use or enjoyment of or access to such facilities. *Re: Swain Development Corp.*, #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10, 1990).

With respect to the second inquiry under Criterion 9(K), the Board has

interpreted this inquiry to be different than that under Criterion 5 concerning unsafe traffic conditions. Under Criterion 5, the Board looks to see whether a proposed project will create traffic conditions which are unsafe or traffic congestion which is unreasonable. The Board may not deny a project simply because such conditions are present. In contrast, under Criterion 9(K), the Board examines whether a proposed project will *materially jeopardize or interfere* with a public facility's function, safety, or efficiency or the public's use or enjoyment of or access to such facilities. *Id.* at 34.

The Board has determined that public highways constitute "public facilities, services, or lands." *Id.* Based on the findings of fact, the only public or quasi public facilities associated with this Project are US 7 and VT 7B. Accordingly, traffic conditions on these highways is examined under Criterion 9(K), and if the Board finds that the Project materially jeopardizes or interferes with the highways, then the Project may be denied.

Thus, the inquiry into traffic safety under Criterion 9(K) involves a higher threshold of material jeopardy or material interference, which is absent from the language of Criterion 5. This conclusion is consistent with the fact that a proposed project may not be denied under Criterion 5 but may be denied under Criterion 9(K).

The Board's review of Criterion 9(K) in this matter is limited to the effect on highways US 7 and VT 7B, the two highways used by Project vehicles. This issue was put before the Board as evidenced in a prior Board Memorandum of Decision and the Board's decision concerning Neighbors' party status.

The burden of proof is on the applicant under Criterion 9(K). *Id.* § 6088(a). A failure to meet that burden may result in a denial of the Land Use Permit application. *Id.* § 6087.

Applicant did not meet its burden of showing that the Project will not unnecessarily or unreasonably endanger the public investment in these highways. The Project includes a maximum of 48 one-way truck trips per hour. The Board has no evidence as to whether this increase in the level of truck traffic will cause a need for upgrading VT 7B nor whether additional roadway maintenance will be required.

With respect to these highways, the Board concludes that the Applicant failed to meet its burden to prove that the Project will not unnecessarily or

unreasonably endanger the public investment in such facilities.

The Board does find, as it did under Criterion 5, that the Applicant has introduced enough evidence to demonstrate that the Project will not materially jeopardize or interfere with the function, efficiency, or safety of these highways. Specifically, the Board finds that the highways are underutilized now and the level of service will remain satisfactory.

I. Criterion 10 -- Conformance with the Town and Regional Plan

Town Plan

Before issuing a permit, the Board must find that the Project is in conformance with the Town Plan. *Id.* § 6086(a)(10). The burden of proof, which consists of both the burden of production and the burden of persuasion, is on the Applicant. *Id.* § 6088(a).

If the town plan provisions are specific, they are applied to the proposed project without any reference to the zoning regulations. A provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. *The Mirkwood Group and Barry Randall*, #1R0786, Findings of Fact, Conclusions of Law and Order at 29 (Aug. 19, 1996).

If the provisions are ambiguous, however, the Board examines the relevant zoning regulations for provisions which resolve the ambiguity. This does not mean that the Board conducts a general review of a project for its compliance with the zoning regulations, but rather it sees if there are provisions in the zoning regulations that address the same subject matter that is at issue under the town plan. *Re: Fair Haven Housing Limited Partnership and McDonald's Corporation*, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 16, 1996), *aff'd*, *In re Fair Haven Housing Limited Partnership and McDonald's Corporation*, Docket No. 96-228 (Vt. Apr. 23, 1997) (unpublished)

1. Specificity of Town Plan

The Board must first decide whether the appropriate Town Plan provision

is "specific" pursuant to the three-part test outlined in *Mirkwood, supra* at 29. First, the Board considers whether the provision pertains to the district in which the Project would be located. The Future Land Use Map of the Town Plan identifies the district within which the Project would be located as "Industrial." The Industrial district is described in the Town Plan's Future Land Use narrative. Thus, the Town Plan's Future Land Use Map and narrative pertain to the district in which the Project would be located.

Second, the Board must consider whether the appropriate Town Plan provision is intended to guide or proscribe conduct or land use within the area or district in which the Project would be located. The Town Plan states that the purpose of the Industrial district is "to provide employment opportunities in manufacturing, warehousing and research and development." *Town Plan* at 72. The narrative states that the district is to be served by good transportation and so that surrounding districts shall not be adversely affected. Additionally, the plan states that "[o]ther uses incompatible with industrial uses, such as residential, will be discouraged for the health, safety and welfare of the community. *Id.* The Board concludes that the Future Land Use narrative is intended to guide or proscribe both conduct and land use within the Industrial district.

Finally, the Board must consider whether the appropriate Town Plan provision is sufficiently clear to guide the conduct of an average person, using common sense and understanding. "[T]he purpose of this [Industrial] district is to provide employment opportunities in manufacturing, warehousing and research and development." *Town Plan* at 72. The Board concludes that it is clear from the plain language and grammatical construction of the provision that the conduct of an average person, using common sense and understanding, will be guided by the Town Plan.

The Industrial district narrative evinces an overriding intent to provide employment opportunities. When the Industrial district narrative is read as a whole, it is clear to an average person, using common sense and understanding, that many uses, except specifically residential uses, are appropriate in Industrial districts. The plan's narrative states that industrial uses are not compatible with residential uses. *Id.* at 55 and 73. This clear meaning is enhanced by the Industrial district narrative that states: "Other uses incompatible with industrial uses, such as residential, will be discouraged for the health, safety and welfare of the community." In addition, the Future Land Use Map clearly identifies all future industrial uses to be located the eastern side of U.S. Route 7, the location

of the Project site.

The Town Plan evinces a clear intent to allow future industrial development to the east of U.S. Route 7.

It is not necessary for a Town Plan to list specific uses that are prohibited or permitted in a particular district. That level of specificity is appropriate in a zoning ordinance, and is not necessarily found in a town plan. A town plan is "merely an overall guide to community development. . . . Often stated in broad, general terms, [a town plan] is abstract and advisory. Zoning bylaws, on the other hand, are specific and regulatory." *Kalakowski v. John A. Russell Corp.,* 137 Vt. 219, 225 (1979).

The Board concludes that the Town Plan is sufficiently clear to guide the conduct of an average person, using common sense and understanding. *Mirkwood*, *supra*. *Compare* the Town Plan *with*, *e.g.*, *Hand, supra* at 31 (town plan's statement that the purpose of the C-I District is to provide locations of "adequate size" to attract commercial and industrial development was not sufficiently clear). Within the Industrial district, the Town Plan envisions all uses except for residential uses. The construction and operation of the Project is compatible within the Industrial district. The applicable Town Plan provision is clear and specific. The Board therefore concludes that the Project conforms to the Town Plan.

2. Zoning Regulations

Because the Board concludes that the Town Plan is specific, it does not look to the zoning regulations for guidance in interpreting the Town Plan.

3. Conclusion

The Board concludes that the Town Plan is clear and that, based upon the plain meaning of the document, and the Board's best interpretation of the Town Plan leads the Board to conclude that the Project conforms with the Plan.

Regional Plan

The Board next turns to the Project’s conformance with the Regional Plan.

The Board performs its analysis regarding regional plans consistent with

Duppstadt, supra at 44; *see also In re Green Peak Estates*, 154 Vt. 363, 369-70 (1990)(project was not in compliance with regional plan that contained a specific policy against the type of development at issue); *In re Molgano*, 163 Vt. 25, 31 (1994)(project was in compliance with broad and vague regional plan that had no specific prohibitions against type of development at issue). These cases indicate that the Board is to apply specific policies contained in a regional plan and that an ambiguous provision is not such a policy. *Duppstadt, supra*.

For a regional plan's provisions to be deemed a specific policy, the applicable provisions must (a) pertain to the area or district in which the Project is located; (b) intend to guide or proscribe conduct or land use within the area or district in which the Project is located; and (c) be sufficiently clear to guide the conduct of an average person, using common sense and understanding. *Id*. at 45; *Re Herbert and Patricia Clark*, Application #1R0785-EB, Findings of Fact, Conclusions of Law and Order at 40 (April 3, 1997); *Mirkwood, supra* at 29.

Concerning the role of regional plans in Act 250 proceedings, Title 24 of the Vermont Statutes provides:

> In proceedings under 10 V.S.A. chapter 151 . . . in which the provisions of a regional plan or municipal plan are relevant to the determination of any issue in those proceedings:
>
> (1) the provisions of the regional plan shall be given effect to the extent that they are not in conflict with the provisions of a duly adopted municipal plan;
>
> (2) to the extent that such a conflict exists, the regional plan shall be given effect if it is demonstrated that the Project under consideration in the proceedings would have a substantial regional impact.

24 V.S.A. § 4348(h).

Absent guidance as to the relevant provisions of the regional plan, the Board first reviews the entire regional plan to determine whether it contains any specific provisions applicable to the proposed Project. Mark and Pauline Kisiel, #W1279-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 47 (Aug. 7,1998) *reversed on other grounds*, *In re Kisiel,* 11 Vt. L.W. 401 (Dec. 29, 2000). If the plan does not contain any specific provisions which prohibit the

proposed Project, then the Board will conclude that the proposed Project complies with Criterion 10 (regional plan). *Id*.

The Rutland County Regional Plan was adopted in 1994 and was in effect when the Project application was submitted. The section of the regional plan dealing with "Economic Activity," contains a clear goal and policy on siting industrial development. The goal states:

> Support and encourage economic activity in Rutland County through the retention or expansion of existing activity and the appropriate location of new economic activity.

Rutland County Regional Plan at 3-9.

Immediately following this goal is Policy 1 which is intended to implement that goal. Policy 1 states:

> Encourage the local designation of industrial sites adjacent to principal transportation corridors and infrastructure within the county.

Id.

This statement, combined with the lack of any industrial mapping on the regional map, indicates that the Regional Planning Commission intended the town plans to designate local industrial districts, not the regional plan.

The regional plan contains numerous goals and policies dealing with a variety of resource issues. None of them, however, prohibit this project.

In the absence of any clear guidance from the Regional Plan, the Board concludes that the Project conforms with the Rutland County Regional Plan.

In view of the above findings, the Board concludes that the Project complies with Criterion 10.

V. ORDER

1. Land Use Permit Application #1R0849-EB is DENIED.

2. Jurisdiction is returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont this 10th day of July 2001.

ENVIRONMENTAL BOARD*

_/s/Marcy Harding_____
Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
Rebecca Nawrath
Alice Olenick
Nancy Waples
Donald Sargent

* Member Drake was absent for the June 27, 2001 deliberations.
Member Waples was absent for the September 20, 2000; and May 16, June 6, June 27 and July 10, 2001 deliberations.
Member Nawrath was absent for the April 18, 2001 deliberations.
Member Sargent was absent for the October 18, 2000 deliberations.
Member Olenick was absent for the July 10, 2001 deliberations.
All members have reviewed and concur with this decision as it is written with the exception of the following dissents.

DISSENTS

Board Member Holland dissents from the Board's decision as follows:

Criterion 8 - Aesthetics:

I concur with the Board that the Project will create an adverse aesthetic impact, but I disagree that it is undue. I believe that the evidence supports a conclusion that the Project will not be offensive or shocking, especially in light of the mitigating steps taken by the Applicant. Further, the added truck traffic on VT 7B does not reach the level of being offensive or shocking in light of the fact that this is a state highway that bisects and serves a zoned industrial area.

Criterion 9(K) - Effects on Public Investments and Services:

I disagree with the Board that the applicant failed to meet his burden of proof with respect to the Project's effect on highway US 7, the need to upgrade VT 7B, or whether additional roadway maintenance will be required. I would find that the evidence shows that VT 7B is classified as a Major Collector by the Vermont Agency of Transportation. I would also find that the August 30, 2000, site visit did not reveal any weight restriction postings on either US 7 or VT 7B, although the Board did not place this observation on the record. The applicant has demonstrated the adequacy of VT 7B with regard to capacity, widths, turning radii, turning movements, sight distances, and intersection analyses. I also find it compelling that the Agency of Transportation, well aware of the Project scope, has not come forward as a party to oppose this added truck traffic to either highway. Properly registered trucks that operate within the legal load limits on major state and federal highways should not be subjected to further inquiry under 9(K) as to the structural adequacy of these roads or to questions concerning the need for added road maintenance. Given the above, I conclude that the Applicant has provided sufficient evidence to reach a positive

conclusion that the Project conforms with Criterion 9(K).

Board Member Drake dissents from the Board's decision as follows:

Criterion 9(K) - Effects on Public Investments and Services:

Similar to Member Holland, I disagree with the Board that the applicant failed to meet his burden of proof with respect to the Project's effect on highways US 7 and VT 7B. Although the concern for degradation of public highways because of increased truck traffic was raised in requests for party status, it was never raised as an issue during cross examination or board questioning at the hearing. I therefore feel that the applicant has provided sufficient evidence, as highlighted in Member Holland's dissent above, to satisfy his burden of proof with respect to the issues raised by the Board and "Neighbors" with respect to 9K. I therefore conclude that in this specific instance the Project conforms to criterion 9K. I do not agree with Member Holland, however, that properly registered and operated trucks should be immune from further inquiry under 9(K) with regard to highway upgrading and maintenance needs.